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INCLUDING

Bankruptcy Cases,

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE

CHIEF JUDGE IN BANKRUPTCY.

EDITED BY G. W. HEMMING, BARRISTER-AT-LAW.

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107	6 and 11, dele "Copyright of Designs."		
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307	—7, dele "of the children."		
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NOTE AS TO THE REFERENCE TO RECORD NOW PRINTED WITH THE TITLE OF EACH CAUSE.

The Reference to Record, which is noted on the bill, gives the year of filing, the initial letter of the surname of first Plaintiff, and the consecutive number of the bills of that year and letter, and leads to the file of pleadings in the Record and Writ Clerk's Office.

The year, letter, and number, also lead to the entry of the cause in the Cause Books. The Cause Books commence in the year 1842. As to causes commenced before the 2nd of November, 1852, they contain the dates of pleadings and formal proceedings. As to subsequent causes they contain, in addition to these particulars, the dates of all decrees, orders, reports, and certificates made since the 30th of November, 1855. In these books there is entered against every decree or order a reference to the volume and folio of the Registrar's Books for the year, where the decree or order will be found *in extenso*.

No reference is written against reports or certificates, but the dates, extracted from the Cause Book, lead to the corresponding entries in the Volumes of Reports and Certificates, and the Index thereto.

The Cause Books are kept in the Record and Writ Clerk's Office.

The Registrar's Books and the Index thereto, and the Reports and Certificates and the Index thereto called the Calendar of Reports, are kept in the Report Office, a branch of the Record and Writ Clerk's Office under the same roof.

For the time of commencement of year in the "Registrar's Books," see 1 Seton, pp. 2, 3.

When the Reference to Record is not known, it may be found by searching for the necessary period the Index to Cause Books kept in the Record and Writ Clerk's Office.

In searching for decrees, orders, reports, and certificates made in causes commenced before the 2nd of November, 1852, or made in subsequent causes before the 30th of November, 1855, or made in matters, the old method must still be followed, viz.:

If a decree or order is required, search in the Report Office the Index to the Registrar's Books; if a report or certificate, search in the same office the Calendar of Reports. The Index to the Registrar's Books gives the reference to the Registrar's Books, and the Calendar of Reports the reference to the Volumes of Reports and Certificates.

Affidavits are filed in the Record and Writ Clerk's Office, where the Index thereto may be searched.

Petitions are filed in the Report Office, where the Index thereto may be searched.

Equity Cases

(*Including Bankruptcy Cases*)

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE

CHIEF JUDGE IN BANKRUPTCY.

LYALL *v.* LYALL.

M. R.

[1860 L. 115.]

1872

Succession Duty—Foreign Domicil—Settlement—Residuary Estate.

July 6; *Nov.* 4.

By a marriage settlement executed in *England* the husband assigned to trustees (all domiciled and resident in *England*) an English policy of assurance, effected on his own life for £2000, payable at the expiration of six months after his death, and a sum of £1047 3*s.* 8*d.* Consols, and covenanted to pay to the trustees within three years a sum of £1000; and it was declared that the policy moneys and the £1000 should be held upon trusts for investment and payment of the income to the wife for life, and then to the husband for life, and then for division among the children of the marriage. The husband died within three years, having been at the time of his marriage, and thenceforth, up to the time of his death, domiciled in *New South Wales.* The wife survived only three months, and left one child, the Plaintiff, who was also domiciled abroad. At the time of the wife's death neither the policy moneys nor the £1000 covenanted to be paid to the trustees of the settlement had been paid to them:—

Held, on the authority of *Attorney-General* v. *Campbell* (1), that succession duty was payable by the Plaintiff on the funds to which he became entitled under the settlement.

By his will, the husband appointed trustees and executors in *New South*

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Wales to collect his residuary estate (which was all locally situate in that country), and transmit the same to trustees and executors in *England*, who were to invest the funds so transmitted in Government funds or real securities, and pay the income to his wife for her life, and after her death to divide the same among the children. At the time of the wife's death no part of the residuary estate had reached the hands of the English trustees, but large remittances were afterwards made to them :—

Held, that no succession duty was payable by the Plaintiff on the funds to which he became entitled under the will.

IN May, 1850, *John Campbell Lyall*, of *Sydney*, in *New South Wales*, intermarried with *Octavia Sophia Nunn*, of *Colchester*, in the county of *Essex*. The marriage was solemnized in *England*. Previous to the marriage a settlement was executed by and between *John Campbell Lyall*, of the first part, his intended wife, of the second part, and the Defendants *William Lyall*, *Thomas Shutt Atkins*, and *Roger Sherly Nunn* (all resident in *England*), trustees of the settlement of the third part. The settlement recited that the husband had insured his life with an English life assurance company for £2000 (payable at the expiration of six months after his death), and had invested £1000 in the purchase of £1047 3*s.* 8*d.* Consols, in the name of the trustees; and in consideration of the marriage, the husband thereby assigned the policy to the trustees, and covenanted to pay to them, within three years from the date of the settlement, the further sum of £1000; and it was thereby declared that the proceeds of the said policy and the said sum of £1047 3*s.* 8*d.* Consols, and also the sum of £1000 covenanted to be paid as aforesaid, should be held by the said trustees in trust to invest the same in Government stocks or real securities, or such other securities as therein mentioned, in trust to pay the income thereof to the wife for her life, for her separate use, and after her decease to the husband for his life, and after the decease of the survivor, in trust for the children of the marriage, as the husband and wife should jointly appoint, and, in default of such appointment, upon trust for all the children of the marriage, equally to be divided between and among them, if more than one, share and share alike as tenants in common, and in case there should be but one child, then upon trust for such only child; the shares of sons to be vested at twenty-one, and to be assigned or transferred to them at the same age, unless the same should happen in the lifetime of the

husband and wife, and then immediately after the decease of the survivor of the husband and wife.

In August, 1850, *John Campbell Lyall* made his will, and thereby appointed *John Brown* and *William Brown*, both of *Sydney*, in *New South Wales*, executors and trustees of his will, for the purposes of collecting, getting in, converting into money, and remitting to his executors and trustees in *England*, all and singular his estate, property, and moneys at *Sydney*. The testator then proceeded to bequeath all and singular his estate, property, moneys, and effects at *Sydney* to the said *John* and *William Brown*, upon trusts, to sell such portion thereof as should be saleable and should not consist of money, and to collect and get in all moneys due to him; and to remit the proceeds to *England* to his executors and trustees thereinafter named for carrying into effect his will in *England*. And the testator then appointed *William Lyall*, and his son *William Andrew Lyall*, executors and trustees of his will in *England*, for the purpose of collecting and getting in all his assets and estates in *England*, and for receiving all the property and moneys which should be transmitted or remitted from *Sydney*, and for the general purpose of carrying his will into effect. And the testator directed his last-mentioned executors and trustees to invest all his moneys on Government funds or real securities at interest, and to pay the income to his wife during her widowhood for the support of herself and her children; and after her death upon trust to transfer, pay, and divide the same unto and among his children in equal shares and proportions, and to be vested in sons on attaining twenty-one, and in daughters on attaining that age, or marrying.

The testator died at *Sydney*, in *New South Wales*, on the 24th of April, 1853. He was at the time of the settlement executed on his marriage, and thenceforth until his death, domiciled at *Sydney*, and all the estate and effects to which he was entitled at the time of his death were situated there. His widow survived him three months, and died on the 20th of July, 1853, leaving *Roger Andrew Lyall*, the Plaintiff in this suit and the only child of the marriage, her surviving. The Plaintiff was born in *Sydney*, and was by domicile of birth a foreigner, and such domicile had not been changed. At the time of Mrs. *Lyall's* death none of the moneys or

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property subject to the settlement, except the £1047 Consols, had come to the hands of the trustees thereof, and no part of the testator's estate had been remitted to *England*.

In 1860 the Plaintiff, by his next friend, instituted a suit in this Court for execution of the trusts of the settlement and administration of the testator's estate. Under the decree and orders made in the cause, the £1047 3*s.* 8*d.* Consols, and the proceeds of the investment of the £2000 secured by the policy of assurance (making together the sum of £4277 2*s.* 11*d.* Consols), were transferred into Court to "the settlement account," and the £1000, covenanted to be paid by the settlor to the trustees of the settlement at the end of three years, was made good out of the estate of the testator and invested in Consols, which were afterwards transferred to the same account. The residuary estate of the testator was also invested in Consols, and the investment was transferred into Court to "the will account," and a sum of upwards of £18,000 Consols was standing to the credit of the last-mentioned account.

The Plaintiff, having attained the age of twenty-one, now petitioned for transfer to himself of the funds in Court. It was admitted that succession duty was payable on the £1047 3*s.* 8*d.* Consols, but the Crown claimed duty on the other funds standing to the settlement account, and also on the funds standing to the will account.

Sir *R. Baggallay*, Q.C., and Mr. *Hemming*, for the Petitioner :—

The Plaintiff's title to the funds accrued in July, 1853. At that time there were no funds in *England* subject to the trusts of the settlement or the will. The policy moneys were not payable until six months after the death of the insured, and had not been paid; and no part of the testator's estate had been remitted to *England*, either for the purpose of fulfilling the contract in the settlement, or upon the trusts of the will. The case is governed by *Wallace* v. *Attorney General* (1), where it was laid down that the residuary estate of a testator domiciled abroad is not subject to succession duty. In *Attorney-General* v. *Campbell* (2) the question was whether a particular fund formed part of the residue or had been severed therefrom: the House of Lords held that it had been severed, and

(1) Law Rep. 1 Ch. 1.

(2) Law Rep. 5 H. L. 524.

had become an English trust fund, and therefore that duty was payable; but in the present case there had been no severance, and the fund was not in *England* when the Plaintiff's title accrued.

Mr. *E. G. White,* for the Executors of the tenant for life.

The *Solicitor-General* (Sir *G. Jessel*) and Mr. *W. W. Karslake,* for the Crown:—

First, as regards the policy moneys. The policy was with an English assurance company, and was assigned to English trustees. It has been decided that money due on a policy is property within the meaning of the *Stamp Acts;* it was property in *England,* for both the debtor and creditor were resident there; and the fact that the debt had not been paid at the date of the succession is wholly immaterial.

Next, as regards the £1000 covenanted to be paid to the trustees of the settlement. This was a debt due from the testator to English creditors; it had therefore, in the eye of the law, a locality in *England,* the domicil of the creditors: *Story's* Conflict of Laws, s. 399. It was subject to the jurisdiction of English courts, and is liable to succession duty according to the principles laid down in *Attorney-General* v. *Campbell* (1). It was money payable under an "engagement," within sect. 1 of the *Succession Duty Act.* Then as to the residuary estate. The testator directed that to be transmitted to this country, and invested and administered here. It is, therefore subject to succession duty, according to the case last cited. If a testator dies here, having debts due to him in *Australia,* the executors may be sued for probate and legacy duty, and it is no answer to say that the property is not in this country. So here, it is no answer to say that the property was not in this country when the succession accrued. The English trustees and executors had the right to compel the Australian executors to pay to them; that created an obligation on the part of the Australian executors in the nature of a debt to the English trustees—a debt payable in *England* to persons domiciled there; and therefore, in the eye of the law, having a locality in *England.* It is true that the Australian executors were entitled to a reasonable time to transmit

(1) Law Rep. 5 H. L. 524.

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the property to *England*, but the only effect of that would be to entitle the English executors to a reasonable time to pay the duty. The case of *Attorney-General* v. *Brunning* (1) shews that for fiscal purposes the time at which the property is transmitted to *England* is immaterial.

In the judgment of Lord *Cranworth*, in *Wallace* v. *Attorney-General* (2), there are *dicta* inconsistent with this line of reasoning; but these *dicta* were dissented from by the House of Lords in *Attorney-General* v. *Campbell* (3), though the decision itself was approved of. If a person domiciled in *Paris* gives a legacy to a Parisian, the mere circumstance that the legacy consists of a sum of Consols does not render it liable to legacy or succession duty; but a legacy payable to an Englishman is property in *England*, and liable to succession duty. Here the residuary estate of the testator was payable to English trustees, who were to hold it upon trust for the testator's widow for life, and then for the Plaintiff; by the widow's death a succession accrued, on which duty is payable.

Sir *R. Baggallay*, in reply:—

If a Frenchman gives a legacy of Consols to a Frenchman, succession duty is not payable thereon: *Wallace* v. *Attorney-General*; but if the Frenchman directs his executors to set apart a fund of Consols and pay the income to *A.* for life, and then transfer the fund to *B.*, succession duty is payable, according to *Attorney-General* v. *Campbell*. Between them, these two cases shew that two things are necessary in order to entitle the Crown to succession duty: 1. a settlement; 2. the appropriation of a fund in *England* upon the trusts of the settlement. Here there was a settlement, but no appropriation of property in *England* at the time when the alleged succession accrued; the claim to duty therefore fails.

As to the fund representing the policy moneys, the testator's estate was the creditor, not the trustees of the settlement; if, therefore, the locality of the debt is regulated by the domicil of the creditor, the debt must be treated as being foreign property. More-

(1) 8 H. L. C. 243. (2) Law Rep. 1 Ch. 1,
(3) Law Rep. 5 H. L. 524.

over, the policy money was not payable until a date subsequent to the death of the widow, and therefore to the date of the alleged succession.

Then as to the £1000 covenanted to be paid to the trustees of the settlement, the testator did not live long enough to entitle the trustees to sue him.

[He referred to *Thomson* v. *Advocate-General* (1).]

Nov. 4. LORD ROMILLY, M.R.:—

This is a petition for the payment out of a fund in Court, on which the Commissioners of Inland Revenue claim succession duty. It raises an important question on the construction of the *Succession Duty Act*, which has been much discussed in the Court of Chancery and the House of Lords, and which, as far as I can judge, from examining the cases and the observations of the Judges in deciding them, has been the subject of some conflict of opinion.

The facts are these. [His Lordship stated them, and continued:] Succession duty is claimed on the three sums constituting the settlement fund. The liability to pay succession duty on the £1047 3*s.* 8*d.* Consols invested at the date of the marriage, on the trusts of the settlement, is not disputed.

The question arises on the money secured by the policy on the life of the settlor, and also on the sum of £1000 covenanted to be paid by him three years after the date of the settlement.

Both these sums were payable for the first time after the death of the settlor.

By the terms of the policy the money thereby secured was not payable till six months after the death of the settlor. The covenant to pay the £1000 was not enforceable till three years after the date of the settlement, and therefore no debt arose until the 22nd of May, 1853, which was one month after the death of the settlor. On behalf of the Petitioner it is contended that no succession duty can arise before the property is in existence which is to be settled; that the trusts cannot arise until the property is in existence in the hands of the trustees who are to execute the trusts, and that

(1) 12 Cl. & F. 1.

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this could not be, so far as related to the £1000 covenanted to be paid, till the Australian trustees remitted the £1000 to the settlement trustees; and as regarded the policy of assurance, till the money thereby secured was paid to them by the insurance company. On the other hand, for the Commissioners of Inland Revenue, it is contended, as regards the £1000 covenanted to be paid, that the locality of a debt is where the creditor resides; and that £1000 due by an Australian to an Englishman is English personal property, and consequently that the creditors were English trustees, and the money due to them by the testator was English property, to which, at the death of the survivor of the settlor and his wife, the Petitioner succeeded under the trusts of the settlement; and that the domicil of the Petitioner does not affect the question; and that if neither he nor the property had ever come to this country, still the trustees would have been liable to pay the succession duty, and that they must recover it from the Australian executors, as part of the charges they were liable to pay for their testator out of his estate.

In answer to this, it is urged that by the case of *Thomson* v. *Advocate-General* (1), it is determined that the rule *Mobilia sequuntur personam* applies as regards the *Legacy Duty Act*, and consequently that in this case the property cannot under these Acts be properly treated as English property. In answer to this, the commissioners contend that this rule is confined to the *Legacy Duty Acts*, and does not apply in the case of the *Succession Duty Act*.

The case principally relied upon for the Commissioners of Inland Revenue is the case of the *Attorney-General* v. *Campbell* (2), heard before the House of Lords, in April of this year. The case so relied upon was to this effect:—

William Callanane, who was by birth an Irishman, but who had for many years resided and carried on business at *Oporto*, in the kingdom of *Portugal*, and who, for the purposes of that case, was taken to have acquired a Portuguese domicil, in the year 1853 came to *London* for medical advice, and died there on the 11th day of September, 1853. By his will, which was made in *England* a few days before his death, and was in the English form, he gave

(1) 12 Cl. & F. 1. (2) Law Rep. 5 H. L. 524.

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the residue of his estate (which chiefly consisted of the profits of his business carried on at *Oporto*) to four trustees, of whom three were Englishmen and resident in *England*, and the fourth was an Irish Roman Catholic priest resident at *Oporto*, upon trust for conversion, and with a direction to invest the proceeds of such conversion in the £3 per Cent. Consolidated Bank Annuities of *Great Britain;* and the trustees were directed (amongst other trusts) out of the income to pay an annuity to the testator's sister, *Elizabeth Callanane*, for her life. She died in 1870, when the annuity determined, and the funds which were set apart to meet the annuity under a direction to that effect in the will then fell into the residuary estate which the testator, by his will, disposed of on trusts in favour of his son and two daughters.

It came originally before me (1) and I thought that the *Succession Duty Act* did not apply, because, in my opinion, the life annuity, which was the fund said to be settled, was merely a charge on the residue, and might have been satisfied without any investment by the purchase of an annuity for her life, and that whether the testator was a natural-born subject or not, the duty payable on the residue and on the annuity would be legacy duty and not succession duty. I held also that I was bound by the decision in the case of *Wallace* v. *Attorney-General* (2), and that the observations made by the Lord Chancellor *Cranworth* in deciding that case exactly covered the case then before me. The Solicitor-General, in argument before the House of Lords, stated that the exact point had been decided the other way once by the Vice-Chancellor *Stuart* and once by the Vice-Chancellor *Malins*. The cases referred to are: *In re Smith's Trusts* (3) and *In re Badart's Trust* (4).

[His Lordship then stated briefly the effect of these cases, and of *In re Wallop's Trust* (5).]

It will be observed that they none of them touch the point on which I principally relied in deciding that case, which was to this effect: that it was a case of legacy duty and not of succession duty, and that if in that case all the legatees had been liable to legacy

(1) Law Rep. 11 Eq. 378, *sub. nom.* *Callanane* v. *Campbell.*
(2) Law Rep. 1 Ch. 1.
(3) 12 W. R. 933.
(4) Law Rep. 10 Eq. 288.
(5) 1 D. J. & S. 656.

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duty the duty payable would have been under the *Legacy Duty Act* and not under the *Succession Duty Act.*

The case of *Attorney-General* v. *Campbell* (1) was heard *ex parte*, no one appearing for the Respondent; and though the point on which I mainly relied was only slightly alluded to by one of the counsel in the argument before the House of Lords, and was not noticed in their Lordships' judgment, yet the judgment they did pronounce does appear exactly to apply to the case now before me.

In that case their Lordships decided that when a person, whether an alien or a British subject, succeeds to property under a British settlement vested in British trustees, he is liable to pay succession duty, whether the settlement be made by an alien or a British subject, and whether the settlement be made by deed or will, and, as I understand, wherever the property is locally situated. As to the case of *Wallace* v. *Attorney-General* (2), they did not expressly overrule it, but they held that it did not apply to or affect the case before them, as it was one of legacy duty, and the case before them was one of succession duty. This is unquestionably true, if, as they assumed, the case then before them was a case of succession duty, but not if, as I thought, the case before them was one of legacy duty. The case, however, in any view of the case, was materially affected by the dicta of the Lord Chancellor *Cranworth.* Of course the question in the case now before me is one on the construction of the *Succession Duty Act*, and has nothing to do with the *Legacy Duty Acts ;* and on this point their Lordships thought the case of the *Attorney-General* v. *Campbell* so clear, that assuming that the point which was argued, and on which they decided, was the only point which arose in the case, although no argument was adduced for the Respondents, they thought it useless to ask for the assistance of any of the Common Law Judges. It is unquestionable that I am bound by this decision of the House of Lords; still, I cannot but remark that the question seems to me to be left in an unsatisfactory position. It is quite settled that the words of the *Legacy Duty Act* do not include the case of an alien disposing by will of property situate in this country. The words of that Act are these: "Every legacy given by any will or testamentary instrument of any person." Upon these words the House of Lords, consisting

(1) Law Rep. 5 H. L. 524.

(2) Law Rep. 1 Ch. 1.

of Lords *Lyndhurst*, *Brougham*, and *Campbell*, decided in the case of *Thomson* v. *Advocate-General* (1), that the will and legacy of a foreigner was not a will and legacy within the meaning of the statute of 36 Geo. 3, and that consequently legacy duty was not payable, and that the personal property, wherever situate, followed the domicil of the testator. They decided this after summoning the Judges who gave their unanimous opinion after hearing a long argument before them on both sides.

The words of the *Succession Duty Act* are just as large. By the interpretation clause, "property" means every species of property, and the Act applies to everybody. The 2nd section is this: "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act . . . . shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition a 'succession.'"

The question here is whether this is a settlement and a succession within the meaning of the Act. The words, as I have observed, are equally large in both cases. I think, to use the words of Lord Chief Justice *Tindal*, that these words must admit of some limitation in their application, "for they cannot in reason extend to every person everywhere, whether subjects of this kingdom or foreigners, and whether at the time of their death domiciled within the realm or abroad." It may be admitted that there is this distinction between legacy and settlement: that if a foreigner think fit to settle property locally situate in *England* according to English laws it must be subject to all English laws, including that which relates to succession duty, and that in this respect the *Succession Duty Act* must be more extensive than the *Legacy Duty Act;* but it is difficult to see how that can apply to a foreigner who includes in an English settlement not only property locally situate in *England*, but also property locally situated abroad, and settled for the enjoyment in succession of other foreigners.

The observations made by Lord *Cranworth* in *Wallace* v. *Attorney-General* (2) bear strongly on this part of the case. It is stated in argument, and this statement is adopted by the learned Lords in the

(1) 12 Cl. & F. 1. (2) Law Rep. 1 Ch. 1.

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case of the *Attorney-General* v. *Campbell* (1), that the case of *Wallace* v. *Attorney-General* (2) had no bearing on the question before them, because it was a case of legacy duty and not of succession duty; but at the same time another case was heard with it, *Jeves* v. *Shadwell*. If the statement so made by the Solicitor-General and adopted by their Lordships was correct, everybody concerned in the case of *Wallace* v. *Attorney-General* itself fell into an error. It was supposed by the law officers of the Crown who argued the case to be a case of succession duty, and they so treated and argued it; it is so entitled by the reporter who reported it. As a question of legacy duty it was not argued; it is cited by the marginal note as succession duty, and it was decided by the Lord Chancellor as a case of succession duty; and though the facts of the case of *Wallace* do not appear to be other than legacy duty, yet the case of *Jeves* v. *Shadwell* was clearly one of succession duty if the case of *Attorney-General* v. *Campbell* be one; for by it the claimant succeeded as legatee of the testatrix to property settled on her by a previous testator, and accordingly it was argued as such and decided as such. The decisions before Lord Justice *Turner* were cited, particularly *In re Wallop's Trusts* (3). The Lord Chancellor, in delivering judgment, after referring to *Thomson* v. *Advocate-General* (4), used these words (5): "I can hardly think that the Legislature intended, by a sidewind, as it were, and without any preamble indicating its intention, to do what, without exciting attention, would practically operate as a reversal of that which, after frequent discussions in the different Courts, had established the rights of persons claiming as legatees under foreign wills."

He concludes with this observation: "Parliament has no doubt the power of taxing the succession of foreigners to their personal property in this country, but I can hardly think we ought to presume such an intention unless it is clearly stated."

It was on such grounds as these that the decision of the House of Lords in *Thomson* v. *Advocate-General* was based. And it is to be observed that the leading ground for that decision was not any distinction now taken between legacy duty and succession duty,

(1) Law Rep. 5 H. L. 524.
(2) Ibid. 1 Ch. 1.
(3) 1 D. J. & S. 656;
(4) 12 Cl. & F. 1.
(5) Law Rep. 1 Ch. 9.

which latter impost no doubt did not then exist, but it was a ground which applied to all property, wherever locally situated; for if the property was English property, but was given by will by a foreigner to a foreigner, it was held liable to pay no duty, nor did it depend on any distinction that it was or that it was not administered by an English court of justice, but on the ground that the words of the clause could not have universal application, and must rather, as I understand it, be limited by the comity with which one nation regards another, to the effect that the inhabitants of a foreign country are not to be taxed on conferring on another foreigner or for receiving from him a gift, because the property happens to be locally here, unless the words imposing such tax are distinct and unequivocal. This is the right expressly noticed and affirmed in the Act for the creation of Consols, which expressly exempts all foreigners from any tax. And yet the decision in *Attorney-General* v. *Campbell* (1) seems to me to lead in practice to an opposite conclusion.

The result of the distinction now acted upon is this: if an alien on his marriage invest £1000 in Consols in trust for himself for life, and afterwards as he shall by will appoint, and in default of appointment to his son absolutely, and he dies having left this £1000 to *A. B.* by will, *A. B.* would not have to pay legacy duty; at least so I read the case of *Thomson* v. *Advocate-General* (2); but if the alien dies intestate, then the son would have to pay succession duty on the £1000; at least so I read *Attorney-General* v. *Campbell*. All the arguments and observations of Lord *Cranworth* appear to me to apply with equal force to succession duty as they do to legacy duty. Nor does it appear to me that the case now before me was before the Lord Justice *Turner* when he made the observations in the case of *In re Lovelace's Settlement* (3), which are now so much relied upon.

In that case, it is to be observed, that the property was locally situated in *England*, and that it is on this fact that Lord Justice *Turner* mainly relies, but I do not see how that can apply to the case where a foreigner settles property locally situate abroad, because he likes the protection which English courts give to the

(1) Law Rep. 5 H. L. 524. (2) 12 Cl. & F. 1.
(3) 4 De G. & J. 340.

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persons who are the objects of the settlement. This ground of administration is expressly excluded in the judgment of Lord Chief Justice *Tindal* in *Thomson* v. *Advocate-General* (1). It is difficult to see how this can be a settlement of English property under one statute and not so under the other statute; and if so, how can the settlement by a foreigner of foreign property be a settlement within the meaning of this Act? But according to the argument, if a French gentleman, residing in *Paris*, marries an English lady, and makes an English settlement, by which French Rentes are settled on himself for life, remainder to her for life, and after the death of the survivor to the children of the marriage, and that one of the two trustees named is an Englishman and happens to be the survivor, that trustee must be compelled to pay succession duty for the wife and children on the French Rentes because of a rule that property is situated where the creditor resides, though locally situated abroad, and notwithstanding the rule in *Thomson* v. *Advocate-General*, which, as applied to the *Legacy Duty Act*, holds that the personal property, wherever situated, *sequitur personam*. It is also clear, I think, that in that decision (*Thomson* v. *Advocate-General*) the beneficial owner was the person meant to be designated, and not the trustee, who is by fiction of English law the nominal creditor, and who is here introduced in order to obtain the application of the rule stated to exist in *Story's* Conflict of Laws, but so stated with reference to a wholly different matter, for the purpose of interpreting in favour of the Crown the clauses relied upon. I confess that it did somewhat surprise me to hear a technical rule of this description strained to apply to the case of a debt due from a foreigner to English trustees in trust for a foreigner. The case, of course, becomes stronger when it is reflected that the tax is one on Consols not existing at the date of the settlement, but to be bought in the execution of its trusts, and which, when belonging to a foreigner, the English Legislature has declared shall not be subject to any duty, then or thereafter. And here it must be borne in mind that the beneficial owner was at the date of the settlement and of the death of the settlor and of the first tenant for life, a foreigner, and that the orders of the Court of Chancery have all been relating to the property of a foreigner.

(1) 12 Cl. & F. 1.

In conclusion, I must state that it appears to me that the distinction drawn between the two statutes is extremely thin, and that the arguments against legacy duty, as stated in *Thomson* v. *Advocate-General* (1), apply with equal force to the words of this statute, as regards, at all events, property locally situated abroad, and it is to be remembered that that case was not heard *ex parte*, but was twice argued before the House of Lords; and that it was not only the opinion of that tribunal, consisting of Lords *Lyndhurst*, *Brougham*, and *Campbell*, but it was so after taking the opinion of Chief Justice *Tindal* and seven other judges, who were summoned on the occasion, and who were unanimous in their opinion, after hearing the full argument on both sides. As, however, the decision of the House of Lords in the case of the *Attorney-General* v. *Campbell* (2) was unqualified and decisive, and as it clearly appears to me to govern every case of a settlement made in English form, and, consequently, to govern the case before me, I have no option but to follow it, and accordingly I shall make an order to the effect that, the Court being of opinion that, according to the decision in *Attorney-General* v. *Campbell*, succession is payable in this case, order the same to be paid, and order the residue of the fund to be paid to the Petitioner.

Sir *R. Baggallay*:—Does your Lordship's decision extend to the funds which are subject to the trusts of the will?

The MASTER OF THE ROLLS:—No. I hold that no duty is payable on those funds which constitute the residuary estate of the testator.

Solicitors: Mr. *R. Wiltshire*; *The Solicitor of Inland Revenue.*

(1) 12 Cl. & F. 1. (2) Law Rep. 5 H. L. 524.

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Nov. 19, 20.

In re SPENSLEY'S ESTATE.
SPENSLEY *v.* HARRISON.

[1870 S. 29.]

Administration—Mortgagee's Suit—Sale—Priority of Costs.

L.R. 17 Eq 422

In an administration suit by a mortgagee who has obtained an order for sale of the real and leasehold estate for payment of his debt, the personal representatives of the testator are entitled, in case of deficiency of assets, to their own costs, charges, and expenses, in priority to the Plaintiff's costs of the sale.

THE Plaintiff, who was a creditor of a deceased testator, and mortgagee of the whole of his real and leasehold estate, took out a summons for the administration of his real and personal estate, under which he obtained an order for the sale of the real and leasehold estate. The order was in the usual form, and did not provide for adding the Plaintiff's costs to his debt. The Defendants were the executors.

The estate had been sold, and the Plaintiff's debt paid out of the proceeds of the sale; but the balance was insufficient for payment of the Plaintiff's costs of the sale and the costs, charges, and expenses of the executors.

The case now came on for further consideration, and the question was, whether the Plaintiff's costs of the sale should have priority over the executors' costs, charges, and expenses, the assets being insufficient.

Mr. *Fry*. Q.C., and Mr. *Cecil Dale*, for the Plaintiff, contended that the Plaintiff's costs of the sale must be paid first. They cited *Berry* v. *Hebblethwaite* (1) and *Tuckley* v. *Thompson* (2).

Mr. *Rigby*, for the Defendants:—

The executors are entitled to their costs, charges, and expenses in priority to the Plaintiff's costs. Thus, in *Wetenhall* v. *Dennis* (3), in an administration suit by a legatee, it was held that, in case of deficiency of assets, the costs were payable in the following order:

(1) 4 K. & J. 80. (2) 1 J. & H. 126. (3) 33 Beav. 285. 10 Jur. N

first, the costs of the personal representative as between solicitor and client; and, secondly, the costs and expenses of thePlaintiff in selling and getting in the estate. The same rule is applicable to a suit by a mortgagee.

[He referred also to *Tipping* v. *Power* (1).]

Nov. 20. LORD ROMILLY, M.R:—

I shall follow the rule laid down in *Wetenhall* v. *Dennis* (2). It is, I think, clearly settled, that where the assets are insufficient, the executor is entitled in the first place to his costs, charges, and expenses; and that afterwards the Plaintiff is entitled to his costs of the sale.

Solicitors: Messrs. *Newman, Dale, & Stretton*; Messrs. *Cole, Cole, & Jackson.*

(1) 1 Hare, 405. (2) 33 Beav. 285.

V.-C. M.
1872
Nov. 9.

In re IMPERIAL LAND COMPANY OF MARSEILLES.

WALL'S CASE.

Application for Shares—Letter of Allotment by Post—Denial of receipt of Letter—Completion of Contract.

ICPD. 90
4 Ex 248

An applicant for shares in a company denied that he had received the letter of allotment, which was posted in *London* on the 16th of March, and should have arrived on the 17th; and, having written on the 17th recalling his application, applied to have his name removed from the list of contributories:—

Held, that the unsupported evidence of the applicant was not sufficient to prove that the letter of allotment which was posted had not been received, and that the name must therefore be retained upon the list. The Court expressed an opinion that if the letter of allotment had not been received the contract to take shares would still have been binding upon the applicant as soon as the letter was posted.

British and American Telegraph Company v. *Colson* (1) disapproved of.

THIS was an application upon adjourned summons by Mr. *Thomas Wall*, a draper, residing at *Kilkenny*, that his name might be removed from the list of contributories in the *Imperial Land Company of Marseilles, Limited*, in respect of fifty shares allotted to him by the company.

Mr. *Wall* applied by letter on the 6th of March, 1866, for fifty shares in the company. The application was made upon the usual printed form, and was accompanied by payment of £50, being a deposit of £1 per share. On the 14th of March, while in the city of *Manchester*, Mr. *Wall* heard a very bad report of the position of the company, and then determined upon withdrawing his application. He did not, however, carry out his intention till the 17th of the month, upon his return to *Kilkenny*. On that day he wrote to the company withdrawing his application for shares, and stating that under no circumstances would he become a shareholder in the company should they allot him any number of shares; he also applied for a return of the £50 deposit.

The shares in the company were allotted on the 15th of March, and there was evidence to prove that the letters of allotment,

(1) Law Rep. 6 Ex. 108.

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including a letter allotting to Mr. *Wall* fifty shares in the company, were posted in *London* on the 16th of March, and would in the ordinary course of post have been delivered in *Kilkenny* on the 17th, the day on which Mr. *Wall* posted his letter withdrawing his application.

Mr. *Wall* denied by affidavit that he had ever received any letter of allotment from the company. He, however, made no further demand for repayment of the deposit.

Mr. *Cotton*, Q.C., and Mr. *H. M. Williams*, for Mr. *Wall*:—

In order to constitute a contract to take shares in a company there must be an application for the shares, and there must be an allotment and a communication of the allotment to the applicant; and it is not sufficient that the letter should have been posted to the applicant informing him of the allotment, but it must also be received by him. This was settled by the case of the *British and American Telegraph Company* v. *Colson* (1), which decides that although the letter may have been posted to the applicant, yet if, in consequence of a confusion in the numbers in the street, or from any other cause not attributable to the applicant, the letter does not reach him, he is to be considered as if it had never been sent to him at all. That decision was approved of by your Honour in *Townsend's Case* (2). There is no case which has decided that a man is to be considered in the same position as if he had received the letter, where the non-receipt of it is not attributable to his own fault. In the case in the Exchequer Chief Baron *Kelly* said that the party who proposed a contract was not bound by the acceptance of it until the letter of acceptance was delivered to him or otherwise brought to his knowledge, except where the non-receipt of the acceptance was occasioned by his own act or default; and he expressed his opinion that if the law were otherwise it would work great and obvious injustice in a variety of mercantile transactions of frequent occurrence. So in *Reidpath's Case* (3), where the applicant denied that he had ever received the letter of allotment, the Master of the Rolls said, "There are three things which constitute the contract, the application for shares, the allotment of

(1) Law Rep. 6 Ex. 108. (2) Law Rep. 13 Eq. 148.
(3) Law Rep. 11 Eq. 86, 89.

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shares, and the notice of the allotment. . . . Who ought to prove the notice of the allotment? I apprehend the company ought to prove that. Does the fact of putting the notice in the post office sufficiently prove it? I find no case which has laid down that rule." His Lordship there refused to admit the proof in opposition to the positive oath of the applicant, who denied having ever received the letter.

In this case there is the positive denial of Mr. *Wall* that he ever received the letter, and it is not sufficient for the company to prove that the letter was posted with a great number of other letters on a particular day. Mr. *Wall's* name ought therefore to be removed from the list of contributories.

Mr. *Glasse*, Q.C., and Mr. *Higgins*, Q.C., for the official liquidator.

The only proof of the non-delivery of the letter of allotment is the unsupported evidence of Mr. *Wall* himself, and there are many circumstances to throw a doubt upon the validity of that evidence. There is the fact, that it was on the 14th he heard reports which induced him to doubt the stability and honesty of the company, and yet it was not till the 17th that he wrote to withdraw his application for shares. It was probably not till after the delivery of the letters on the 17th that he posted his letter of withdrawal. Then the fact that he did not take steps to enforce a return of the deposit is a material circumstance, for it cannot be supposed that the loss of £50 was perfectly immaterial to a business man. There are also discrepancies in the statement of Mr. *Wall* which would, at any rate, lead the Court to hesitate before it trusted implicitly to his evidence. But even if the letter was not received, we submit that the allotment was still valid, and that Mr. *Wall* is bound by it from the time the letter was consigned to the post. There can be no doubt upon the authorities that the acceptance of a contract is complete from the time the letter containing the acceptance of an offer is posted. This was held in the case of *Potter* v. *Sanders* (1), and in *Dunlop* v. *Higgins* (2) it was decided that the posting of a letter accepting an offer constituted a binding contract from the time when the letter was posted. If, then, a contract is binding as soon as the letter is posted, how can the contract become of no effect because the letter is not delivered? It would be quite as

(1) 6 Hare, 1. (2) 1 H. L. C. 381.

unjust to the person accepting the contract, if it were held that the person offering it were not bound, as it would be to hold the reverse; and mercantile transactions would be materially affected by such a state of the law. It is true that in *British and American Telegraph Company* v. *Colson* (1) the Court of Exchequer decided that the non-receipt of a letter of allotment was sufficient to hinder the allotment from being binding, but the correctness of this decision was questioned in *Harris' Case* (2). Lord Justice *Mellish* said he always understood the law to be the other way until that case, which had caused some doubt on the subject.

In *Dunlop* v. *Higgins*, Lord Chancellor *Cottenham* said that, in the case of a bill of exchange, notice of dishonour given by putting a letter into the post at the right time had been held quite sufficient, whether that letter was delivered or not; and he referred to *Stocken* v. *Collin* (3) as an authority on that point, and was of opinion that the rule as to accepting a contract was exactly the same as sending notice of dishonour of a bill of exchange. *Duncan* v. *Topham* (4) is also a decision to the same effect.

Mr. *Cotton*, in reply.

SIR R. MALINS, V.C.:—

This case certainly seems to raise a question of great importance. There are, in fact, two questions, and they arise in this way: the present applicant, *Thomas Wall*, is described as a merchant and draper in a large way of business in the town of *Kilkenny*. He admits that on the 6th of March, 1866, attracted as numerous persons were by the advertisements of this company, he applied by letter, in the usual form of application, for fifty shares, accompanied by £50, being a deposit of £1 per share, and requested the allotment to be made to him. It may be true that the application for the allotment does not say, "You are to send me the acceptance of the offer by post," but his offer was made by post, and he knew perfectly well that it was the regular settled mode of conducting such business, to send the letter of allotment by post. It is, therefore, as plainly an authority for the company to accept the offer by sending him a letter of allotment by post as if he had

(1) Law Rep. 6 Ex. 108.
(2) Ibid. 7 Ch. 587.
(3) 7 M. & W. 515.
(4) 8 C. B. 225.

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said, in express words, "The letter of allotment you send to me by post shall be binding on me."

It is not necessary to go very minutely into the evidence. It is well known that the process of allotment here was by a committee of directors who made the allotment on the 15th of March, and thereupon it was necessary to send out the letters of allotment. In carrying out that task it became the duty of particular clerks, who were employed for the purpose, to direct the letters of allotment and post them. Now there is the most distinct evidence that, in the ordinary course of business, amongst thousands of others, there was a letter of allotment for fifty shares, in pursuance of Mr. *Wall's* application, sent to him by the post on the 16th of March, 1866.

After the decision in *Townsend's Case* (1) and *Harris' Case* (2), there could be no question as to the fact of his being an allottee if that letter had been received. The ordinary course of post would take it to him at *Kilkenny* on the 17th. On the 17th he writes a letter, as Mr. *Harris* did on the 16th, recalling his application. Mr. *Harris's* letter I held to be too late. Mr. *Wall* does not write from *Kilkenny* till the 17th, therefore there is no doubt in my mind that that was too late. But then he says, "I never received the letter of allotment." Now there are two questions arising—first, did he receive the letter of allotment? If he did, there is an end of all question; if he did not receive the letter, then arises a question, and a most important one, upon which the law is left in a state of doubt and difficulty, namely, whether an offer accepted by letter which is duly posted is binding, although there may have been some miscarriage in the post—whether from the breaking down of a railway train, or the carriage containing the letters taking fire and the letters all being consumed, or the mail packet which carries them foundering at sea, or if from any other cause the letter containing the acceptance of the offer is not delivered—whether the contract can be considered at an end because the letter did not arrive at its destination? That is a question which does not arise in this case if I come to the conclusion that the letter of allotment was, in point of fact, received.

I may say, first of all, that I think there would be very considerable danger, where a letter is proved to have been duly posted and

(1) Law Rep. 13 Eq. 148. (2) Law Rep. 7 Ch. 587.

duly directed, in relying upon the unsupported statement of a person who, wishing to get rid of what he finds to be a burthen, says that he never received it, and any such evidence, in my opinion, ought to be received with the greatest amount of caution. I hope it will be understood that I do not mean to intimate in any way that Mr. *Wall*, against whose respectability not a word has been suggested, intends to misrepresent wilfully when he says that he did not receive the letter of allotment. But his own statement is this, that he was at *Manchester* on the 14th, that he there heard a very bad account of the state of this company, the directors being described as everything that was bad short of being murderers. One would have thought, as a man of business, finding that he had made an application on the 6th to become a member of the company, and wishing to get out of it as quickly as possible, would not have left *Manchester* without writing a letter of recall; and if he had written from *Manchester* on the 14th, it would have been in time to prevent the allotment. Therefore his want of vigilance was such, as a mercantile man, that one cannot feel very much for him. But, having been in possession of this information, he goes back to *Kilkenny*, and arrives there on the 15th, and does not write to repudiate his offer till the 17th, and in the meantime the letter of allotment was sent, and I cannot entertain a doubt that the letter was duly posted on the 16th, because the clerk swears it was, and it was in the ordinary course of duty that it should have been. I know no reason why the letter addressed to him should not have reached him when all the other letters appear to have reached their various destinations. There has been no question, in all the cases that we have had of this nature, that every letter that went away was duly received, except in *Townsend's Case* (1), and that was because Mr. *Townsend* did not give the name of the town in which he lived. With that exception, I have never heard of any of the letters having miscarried. I must, therefore, come to the conclusion that the letter to him was undoubtedly posted in *London* on the 16th. He says he did not receive it. Now with respect to that, I find his mind in a state of confusion. He does not remember what he did or what it was he wrote; he says he made a copy of the letters, one was written in his own handwriting, and one in the handwriting of his son. I am much inclined to think, looking at the

(1) Law Rep. 13 Eq. 148.

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writing, that he is mistaken even in that. But at all events his mind seems to have been in such a state of confusion that I can attach very little importance to his statement about whether he did or did not receive the letter, and there being nothing but his unsupported statement that he did not receive it, I cannot place much reliance on that. If he had brought his clerk or his assistant, or any one to prove that when the post from *London* arrived on the 17th, there was no such letter as that, there might have been more importance attached to the evidence; but unless I am perfectly satisfied that I can implicitly rely upon the statement of a man in such a state of circumstances, I can only come to the conclusion that the letter must have been delivered, and, looking at all the evidence on both sides, I am of opinion that the letter was duly received. Then, coming to that conclusion, I must treat it as a jury would. If this had been an action, the learned Judge in trying the matter would have drawn the attention of the jury to the facts, and would then have said to them, "Gentlemen, it is for you to draw your own conclusion from the evidence, and you will find whether, in your opinion, the Defendant did or did not receive the letter of allotment." The jury, no doubt, would have done that which they did in the case of the *British and American Telegraph Company* v. *Colson* (1). In that case the Court was relieved from any difficulty by the verdict of the jury. Therefore if this were a Court of Law I should be relieved from the difficulty, because the finding of the jury would have settled the question, and I think I am bound as a jury to come to the conclusion that the letter was received.

But it has been contended that, even if it was not received, that is perfectly immaterial. Now, upon that subject there seems to be considerable conflict of opinion. When *Townsend's Case* (2) was before me, and the case of the *British and American Telegraph Company* v. *Colson* was cited, finding that the Court there had decided the point that the letter was not binding unless received, I adopted that view. I thought there seemed to be considerable doubt, and I appear to have said, "It seems to be the law, and I think not unreasonably." But I have thought more of it since then, and my attention has been drawn to what the Lords Justices

(1) Law Rep. 6 Ex. 108. (2) Law Rep. 13 Eq. 148.

said in *Harris' Case* (1), who, although they did not overrule the decision of the Court of Exchequer, may be very fairly said to have thrown cold water upon it, for neither of the Lords Justices expressed any approbation of it; and, although I did say in *Townsend's Case* (2), "It seems to be settled, and not unreasonably," upon further consideration I do not think it is so reasonably settled. In the course of the argument I put a case of this kind: Suppose *A.* receives a letter containing an offer or a proposal, the sender of the letter saying, "I make you an offer, let me have an answer by return of post." By return the letter is posted, and *A.* has done all that the person making the offer requests. There is no default on his part. The letter in its transit is lost or destroyed, why should the man who sends the letter be the only person to suffer? Why should not the man who has in effect admitted that if an answer be sent by return of post it should be binding on him, be the sufferer? Why should he not be put in the same position as if the letter had been actually received? There is some difficulty in it, and if it depended on that, my opinion is that I should come to the conclusion that an offer made by a letter requesting that the answer may be sent by post—it is not by return in this case, but in effect the application says, "whenever you make the allotment let me have it by post"—directly the letter is posted there is a binding contract. I decided in *Harris' Case* that in all cases of contract by letter, the acceptance of the offer by letter is binding the moment the letter is put into the post. Every one knows that the moment a letter is put in the post it becomes the property of the person to whom it is sent, and the person sending the letter has lost all control over it. So if *A.* consigns goods to *B.*, directly they are put on board ship they are the property of the consignee, and the consignor has no longer any control over them, except the right to stop *in transitu*, in the event of *B.'s* insolvency. Therefore I come to the conclusion, that the letter must be treated as having been received, and that conclusion is confirmed by this circumstance, that though this gentleman, writing the letter on the 17th, demands the return of the deposit of £50, he seems to have had so little confidence in the position he assumed that he allowed three years to elapse without again demanding the £50.

(1) Law Rep. 7 Ch. 587. (2) Law Rep. 13 Eq. 148.

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He may have thought, "Now they have allotted the shares to me, it is too late to repudiate them, I will keep quiet, and if they do not say anything to me, I will not say anything to them." Why did he not write and say, "Let me have my £50 back, and if you do not send it me, I will bring an action against you to recover it?" Therefore, in every view of the case, the only conclusion I can come to is, that this gentleman has not done enough to relieve himself from the consequence of his application, followed by the letter of allotment, and he must, consequently, remain on the list of contributories.

Mr. *Glasse* asked that Mr. *Wall* might be ordered to pay the costs.

THE VICE-CHANCELLOR:—I do not see how I can do otherwise. He has entered into the contest and has failed in it, and must therefore pay the costs in Chambers and here also.

Solicitor for Mr. *Wall:* Mr. *W. H. Bishop.*
Solicitors for the Official Liquidator: Messrs. *G. S. & H. Brandon.*

V.-C. M. 1872 *Nov.* 15.

In re RUSSELL'S POLICY TRUSTS.

Policy of Assurance—Incumbrancer—Bankruptcy of Assured—Priority by Notice—Death of Assured.

10 C.P. 327. 328, n.

A policy effected by *A.* on his life was mortgaged in 1860 without notice to the office. *A.* became bankrupt in 1862, and in 1868 joined in a transfer of the mortgage to *B.*, who had no notice of the bankruptcy. After the death of *A.*, *B.'s* solicitor gave notice to the office that this and other policies were mortgaged, and that he acted for the mortgagees, not naming them. Subsequently notice of the bankruptcy was given to the office:—

Held, that this was sufficient to give priority to *B.* over the creditors in the bankruptcy of the assured.

Stuart v. *Cockerell* (1) followed.

In re Webb's Policy (2) not followed.

THIS was a Petition for payment out of Court of a sum of £539 2*s.* 8*d.*, paid in by the *Law Union Fire and Life Insurance*

(1) Law Rep. 8 Eq. 607. (2) 15 W. R. 529.

Company, being the proceeds of a policy of assurance on the life of *Samuel Russell*, of *Worksop*, dated the 19th of May, 1860.

The policy was effected to enable *Russell* to obtain security for a debt of £400 due from him, and by a deed of the 29th of May, 1860, was assigned to the creditor. The solicitor of *Russell* in this transaction was a Mr. *John Whall*, of *Worksop*, who was also a local agent of the insurance company. No notice of this incumbrance was given to the insurance office either by *Whall* or the creditor.

In the year 1862 *Russell* was adjudicated bankrupt, and his bankruptcy was gazetted on the 1st of July, 1862, but no notice of the bankruptcy was given to the insurance office.

By an indenture of the 23rd of March, 1868, to which *Russell* was a party, the debt of £400 and the policy were transferred to the Petitioner for value. The transferee of the debt gave no notice to the office.

There were two other policies on *Russell's* life, as to which similar questions arose with regard to other debts.

On the 9th of August, 1871, *Russell* died, and on the 14th of August, 1871, Mr. *Whall* sent to the secretary of the insurance society the following letter :—

"I regret to have to inform you that Mr. *Samuel Russell*, junior, died recently, and was buried at *Blyth* in the afternoon of Friday, the 16th instant. The three policies on the life of the deceased were duly assigned, and I act for the mortgagees."

This letter was received by the office on the 15th of August.

On the 30th of October, 1871, the office received notice of the bankruptcy from a Mr. *William Hine Haycock*, solicitor to a creditor (there having been no assignee appointed under the bankruptcy) :—

"I understand that by reason of the death of *Samuel Russell* (formerly *Samuel Russell* the younger), that three policies of assurance for £500 each, effected in your office, have become payable.

"I therefore beg to inform you that that gentleman was adjudicated bankrupt in 1862, and his bankruptcy gazetted on the 1st of July in that year, and that I am concerned for a creditor of the bankruptcy.

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"I would suggest that you should at once forward this letter to your solicitors, as the matter must ultimately come before them."

On the 6th of November, 1871, notice was given to the office of a claim by the administratrix of *Russell.*

Mr. *Cotton,* Q.C., and Mr. *Smart,* for the Petitioner:—

An assignee under a bankruptcy has no priority over a particular assignee in respect to property the title to which requires perfecting by notice, or by a stop order, or anything similar, unless the necessary steps are taken to perfect the title: *Stuart* v. *Cockerell* (1). There is one case, *In re Webb's Policy* (2), decided a little before *Stuart* v. *Cockerell,* which may seem to be opposed to this view; but in that case the mortgagor had not concurred in any assignment subsequent in date to the bankruptcy, and the question of the applicability of the order and disposition clause might well be reargued. *In re Barr's Trusts* (3) was also a case in which the assignment was subsequent to the bankruptcy, and the decision was to the same effect as *Stuart* v. *Cockerell. Edwards* v. *Martin* (4) also shews that assignees in bankruptcy and particular assignees are on the same footing as regards giving notice.

Mr. *R. Swan,* for the Registrar in Bankruptcy, who, in the absence of a creditors' assignee, represented the creditors:—

In re Webb's Policy is exactly in point, and must be considered to govern an identical case, in preference to any mere deduction from *Stuart* v. *Cockerell.* The Petitioner having been guilty of laches in not perfecting his title, cannot obtain priority by means of a notice given only after the death of the assured: *In re Rawbones' Trust* (5).

Moreover, so indefinite a notice as this is cannot be considered to give priority. The name of the incumbrancer ought at least to be given.

Mr. *E. S. Ford,* for the insurance company.

(1) Law Rep. 8 Eq. 607.
(2) 15 W. R. 529.
(3) 4 K. & J. 219. 4 Jur. N.S. 1013
(4) Law Rep. 1 Eq. 121.
(5) 3 K. & J. 476. 3 Jur. N.S. 837.

Mr. *G. A. Watson*, for the administratrix, claimed the fund, but submitted that she was, at all events, entitled to her costs of appearance.

Sir R. Malins, V.C., after stating the facts, continued:—

It is not attempted to be disputed that the Petitioner had no notice of the bankruptcy. He, however, omitted to give notice to the insurance office at the time of taking the transfer, but afterwards, *Russell* having died, his solicitor, Mr. *Whall*, wrote as follows:—[His Honour then read the letter above set out, and continued:—] That is clearly notice. It is said that notice, to be valid, must be made during the lifetime of the assured; but that is immaterial, for the principle is, that notice is sufficient if it is given to the party having the fund whilst it remains in his possession. During the lifetime of *Russell* the fund was in his order and disposition, and if the notice had been given by the assignee under the bankruptcy, he would have obtained priority; but the assignee also omitted to give notice.

The question is not between the assignee in bankruptcy and a general assignee, but between him and an assignee of the particular thing; and I can see no grounds for thinking that there is any difference between an assignee in bankruptcy and a particular assignee. The particular assignee loses priority by not giving notice, and the assignee in bankruptcy does the same thing.

Russell, being bankrupt in 1862, was bound to know in 1868 that he had no interest in the policy. He committed a fraud by joining in the transfer, and the assignee in bankruptcy, by not giving notice, gave him power to commit the fraud. Exactly the same point occurred in *Stuart* v. *Cockerell* (1); and though it does seem that in *In re Webb's Policy* (2) I felt myself bound by previous authorities to decide in favour of the assignee in bankruptcy, I now adhere to my later decision in *Stuart* v. *Cockerell*, and hold that the Petitioner will be entitled to prove for the full amount of his debt, and that, subject to his incumbrance, the assignees in bankruptcy will be entitled to the fund. For I cannot accede to the argument that the legal personal representative can take anything by reason of the omission of the assignee in bank-

(1) Law Rep. 8 Eq. 607. (2) 15 W. R. 529.

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ruptcy to give notice enabling the mortgagor to commit a fraud by being party to an assignment of property in which he had no interest.

The costs of all parties will be paid out of the fund, and the balance will be carried over.

I think it is clear that the negotiation of the policy through the country agent of the insurance office was not sufficient to give the office notice.

Solicitors: Mr. *W. H. Haycock;* Mr. *W. H. Tattam;* Mr. *George Burges.*

V.-C. M. 1872 *Nov.* 20.

BOOTH *v.* HUTCHINSON.

County Court Appeal—Set-off—Unliquidated Damages—Mutual Dealings—Bankruptcy Act, 1869, *s.* 39.

Under the *Bankruptcy Act*, 1869, the right of set-off is extended to unliquidated damages.

Where a person from whom rent is due to an estate in course of administration under the *Bankruptcy Act*, 1869, has a claim against the estate, he may set off his claim against all rent due down to the close of the bankruptcy.

THIS was an appeal from the County Court at *Knaresborough.*

In the month of September, 1869, *William Greetham* entered into a verbal agreement to let a house at *Harrogate* to the Respondent, *Hiram Crompton Booth,* from the 1st of October, 1869, to the 6th of April, 1870, for the rent of £17 10*s.*, and from the 6th of April, 1870, thenceforward, at the rent of £80, payable half-yearly on the 6th of October and 6th of April. The house was then in an unfinished condition, and *William Greetham* also agreed that it should be completed in a proper and tenantable state before the 6th of April, 1870.

On the 6th of April, 1870, the rent then due was not paid, and *Greetham* recovered it by distress, *Booth* paying the amount under protest, alleging that *Greetham* had failed to complete the house in accordance with the agreement.

On the 11th of June, 1870, *Greetham* executed a deed of assignment of all his real and personal estate to the Defendants, *Hutchinson* and others, upon trust for the benefit of his creditors.

The deed was expressed to be made between *Greetham* of the first part, and the trustees for themselves and the rest of the creditors of *Greetham* of the second part, and after assigning all the property to the trustees upon trust to sell and convert the same, and to pay the costs of preparing the deed, it continued as follows:—

"And in the next place to pay, retain, and satisfy rateably and proportionably, and without any preference or priority to themselves, the said trustees and their partners, and the other persons parties hereto, who shall execute these presents within six calendar months from the date hereof, the several debts or sums set opposite to their respective names in the said schedule hereto, subject to the covenant hereinbefore contained for verifying the amount thereof."

By a subsequent clause it was provided that all questions relating to the trust estate should be decided according to English bankruptcy law, and the last operative part was a release to *Greetham* by the creditors who should execute the deed of their respective debts, conditional on his having made a full disclosure of his estate.

The rent due on the 6th of October, 1870, was not paid on that day; and on the 17th of December following a distress was levied for the sum of £40 at the instance of the trustees. On the 22nd of December *Booth* replevied; and at the trial of the replevin suit on the 10th of February, 1871, at the County Court, judgment was given for the trustees for £40, less property tax, which sum was afterwards paid by *Booth*.

On the 18th of February following *Booth* filed a plaint against *Greetham* and the trustees to recover damages for non-completion of the house by the 6th of April, 1870. The plaint came on for trial on the 10th of March, 1871. The Judge struck out the names of the trustees as Defendants, and gave judgment against *Greetham* for £50 damages, and the costs of the suit.

Before the 6th of April, 1871, a mortgagee recovered possession of the house by an action of ejectment.

On the 10th of July, 1871, a plaint in equity was filed in the

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County Court at *Knaresborough* for an administration of the trusts of the deed of assignment of the 11th of June, 1870, by *Booth*, who had not previously executed it, and a decree was made thereon on the 11th of August, 1871. On the 10th of November, 1871, the plaint came on for final hearing, and the order was made which was the subject of the present appeal.

It declared as follows:—

"That the Plaintiff is entitled to be repaid out of the fund in Court the sum of £40, in preference to any claim on the part of the trustees, with interest thereon at 5 per cent. from the time of payment, and it is ordered that the Registrar do pay the same accordingly."

Mr. *H. A. Giffard*, for the Appellants:—

There is no case of mutual credit here such as gives any right of set-off. Section 39 of the *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71), which gives the right of set-off, is a continuation of the old mutual credit clauses in the previous Bankruptcy Acts, the wording being only varied by the addition in the last Act of the words "mutual dealings." Under the old law it was decided by a long series of authorities, amongst which are *Simpson* v. *Burton* (1), *Bell* v. *Carey* (2), *Rose* v. *Hart* (3), that there is no set-off in the case of unliquidated damages. *Rose* v. *Hart* has been always treated as a leading authority, and frequently cited with approval, even in cases as late as *Naorogi* v. *Chartered Bank of India* (4) and *Stanger* v. *Miller* (5).

[Mr. *W. Pearson*, who appeared for the Respondent, mentioned the case of *Makeham* v. *Crow* (6) as being a decision on the point.]

That decision cannot be considered to settle the present question. It merely decided that a plea of set-off was *primâ facie* good, leaving it to the Plaintiff to demur to the plea if he thought proper.

[The VICE-CHANCELLOR:—Is *Gibson* v. *Bell* (7) consistent with the undiminished authority of *Rose* v. *Hart*?]

(1) 2 B. & B. 89.
(2) 8 C. B. 887.
(3) 8 Taunt. 499.
(4) Law Rep. 3 C. P. 444.
(5) Ibid. 1 Ex. 58.
(6) 15 C. B. (N. S.) 847.
(7) 1 Bing. N. C. 743.

Rose v. *Hart* (1) was treated as a binding authority, as late as 1868, in *Naorogi* v. *Chartered Bank of India* (2). But, assuming that, under the new law, the right of set-off exists in this case, its extent has to be considered.

It ought, at least, to be limited to the rent due at the date of the deed, and not extended, as it is by the decision of the County Court, to rent accruing afterwards; for otherwise enormous sums might be set off for the supposed value of existing leases. The point has already arisen, and in *Ex parte Ryder* (3) it was decided that the date of a bankruptcy deed is the time to which mutual credit is allowed.

Moreover, the form of the decree is inconsistent with the frame of the deed, which provides for an equal distribution of the estate amongst all the creditors: *Bailey* v. *Johnson* (4).

Mr. *W. Pearson*, for the Respondent, was not called upon.

SIR R. MALINS, V.C., after stating the facts, continued:—

The question is, whether the Respondent is bound to take a dividend only on the £50 recovered in his action, or can set it off against the £40 due from him for rent. At the date of the deed *Greetham* was under an unascertained liability for breach of the covenants in the lease, which resulted in a verdict for £50. The action merely ascertained the amount of the previously existing liability.

If the case were under the old law, I should probably have concluded that there was no right of set-off. But the old decisions rested on the construction which the Courts had put upon the words "mutual debts" and "mutual credits." The construction put upon those words produced some very remarkable decisions, but none more so than that in the case of *Rose* v. *Hart*, in which it was held that a fuller was not entitled to detain cloths, deposited by a bankrupt before his bankruptcy for the purpose of being dressed, for his general balance for such work done by him for the bankrupt previously to his bankruptcy; for that there was no mutual credit under the statute 5 Geo. 2, c. 30, s. 28.

Whether the doctrine laid down in that case would now be

(1) 8 Taunt. 499.
(2) Law Rep. 3 C. P. 444.
(3) Law Rep. 6 Ch. 413.
(4) Ibid. 6 Ex. 279.

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supported to its full extent, may well be doubted since the case of *Gibson* v. *Bell* (1), even under the more restricted words of the old Bankruptcy Acts. But if that were so, the language of the Act of 1869 is altered from that of the previous Acts, and made more comprehensive. I must therefore conclude that the right of set-off given by the previous Acts was considered to be too restricted, and was intended to be enlarged.

[His Honour then read the clause as it stood in the old Acts, and sect. 39 of the present Act, and continued:—]

Here there was no mutual debt, because the amount of the liability was unascertained at the date of the deed. There was hardly a mutual credit, but there certainly was a mutual dealing with reference to the house; and if there had been no bankruptcy, the right of set-off was clear. On one side rent was owing, and on the other side there was the amount of damages in the action. When they were ascertained the result was, that there was a balance of £10 against the estate. At the date of the deed *Greetham* was really liable for £50, only no one then knew the actual amount. But when it was ascertained it became at once a debt, and that was the amount really due at the date of the deed. Now, ought there to be a set-off? It is common justice, looking at the state of things at the date of the deed, that these transactions should be considered in the light of mutual dealings between the parties.

Then the question is, whether the Act of 1869 allows unliquidated damages to be set off. For the first time since these clauses have appeared in Bankruptcy Acts, the words "mutual dealings" occur in addition to the words "mutual credits;" and it must be remarked that this is not the first time unliquidated damages have been treated as subject to the right of set-off, because the precise point came before the Court of Common Pleas in the case of *Makeham* v. *Crow* (2). That was under the Act of 1862, in which the right of set-off was given in different language; but the question was precisely the same. It arose upon an action by the assignees of a bankrupt for the price of certain machinery sold and delivered by the bankrupt to the Defendant, and the Defendant pleaded an equitable plea of set-off for unliquidated damages for

(1) 1 Bing. N. C. 743. (2) 15 C. B. (N. S.) 847.

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non-performance of the contract by the bankrupt. It was suggested in argument that the application was *ex parte*, but from the report it appears that a rule had been previously granted, and cause was then shewn against it; and though the form of the judgment does not give much information as to the grounds on which the Court arrived at the conclusion, it was held that the plea was good, reserving, however, to the Plaintiffs the right to reply and demur. Therefore, when I find in this Act these additional words, I am bound to assume that they were intended to give a more extended right of set-off than previously existed; and this case is so clearly one of mutual dealings that I must consider it as being within the scope of the Act.

Then the Appellants raise the question, whether the whole rent is to be set off on the principle on which a valuation of an annuity is made, or there must be an apportionment to the date of the deed, and only the portion previously accruing set off. It was said that a valuation of a lease would in many cases cause a very large amount to be set off, but that consideration does not apply in the present case, where the tenancy might easily be brought to an end by notice. The question, however, has to be decided, and I think that a rule may be deduced from the Act of 1869 which will govern this point. By sect. 31 of the Act "liability" is defined as including "any obligation, or possibility of an obligation, to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur, or capable of occurring, before the close of the bankruptcy." I think that liability for rent is within that definition. My impression, therefore, is, that such rent as became due before the time which is analogous to the close of the bankruptcy—that is, before the distribution of the estate under the provisions of the deed—is the subject of set-off.

The appeal will consequently be dismissed with costs; and I leave it to the County Court to determine whether the costs of the Appellant are to be paid out of the estate.

Solicitors: Messrs. *Paterson, Snow, & Burney;* Messrs. *Gold & Sons.*

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PARFITT *v.* CHAMBRE.

[1870 P. 166.]

Ex parte D'ALTEYRAC.

Penalty—Claim under an Award—Payment ordered to be made as a Penalty—Whether recoverable in full, or to the extent only of such Damages as the Court might assess.

An action at law was by consent of the parties referred, and the arbitrator awarded and ordered that the Defendant in the action should pay to the Plaintiff in the action an annuity of £1200 a year for life, and that, "in order to secure the annuity," the Defendant should, within two months, purchase and convey to trustees, on behalf of the Plaintiff, a government annuity of £1200 a year, and that if for any reason the annuity should not have been legally secured before the last day of the second month from the date of the award, then, in addition to the annuity, a further sum of £100 should become due and payable by the Defendant to the Plaintiff on the last day of the second month, and a like sum of £100 on the last day of each successive month, until such annuity should be legally secured; and the award added: "These monthly payments are to be considered as additional to the payments due in respect of the annuity, and as a penalty for delay in the legal settlement of the same."

No annuity, as directed by the award, having ever been purchased; the Plaintiff having been adjudicated a bankrupt; the Defendant having died; and the £1200 a year and £100 a month having been regularly paid to the Plaintiff and her assignees up to the Defendant's death, but not since; upon claim by the assignees to prove against the Defendant's estate for the payments due in respect of the annuity, and of the monthly payments accrued due since his death:—

Held, that the £100 a month, though called a penalty, was not to be regarded strictly as such; and that the assignees were entitled to prove for the arrears both of the annuity and the £100 a month.

Adjourned summons.

On the 20th of September, 1866, an action was commenced by *Junia Maria* Countess *D'Alteyrac* against the late Lord *Willoughby d'Eresby*, for the conversion and detention of certain plate, furniture, and effects; and on the 3rd of February, 1868, by agreement between the parties, the action was referred.

On the 4th of April, 1868, the arbitrator made his award, whereby (after a preliminary statement of the grounds on which he had decided) he awarded (amongst other things) that Lord *Willoughby* should pay to the Countess an annuity of £1200 for the term of her life, the annuity to date from the 1st of April,

1868, and to be payable by half-yearly payments; and ordered the same accordingly. He further awarded that, "in order to secure the said annuity" to the Countess, Lord *Willoughby* should, within two months from the date of the award, purchase from the Commissioners for the Reduction of the National Debt an annuity of £1200 a year for the life of the Countess, and should convey the same to trustees on her behalf, named in a deed thereto annexed; and ordered accordingly. He further awarded that "if for any reason the said annuity shall not have been legally secured, as herein directed," by Lord *Willoughby* before the last day of June, 1868, then, in addition to the annuity, a further sum of £100 "shall become due and payable by" Lord *Willoughby* to the Countess upon the same last day of June, 1868, and a further sum of £100 on the last day of each successive month, "until such annuity shall be legally secured;" and he ordered payment of the same accordingly.

The award then proceeded thus:—

"These monthly payments are to be considered as additional to the payments due in respect of the annuity, and as a penalty for delay in the legal settlement of the same; but are not to prejudice the right of the Countess to enforce the securing of the annuity by other means."

No purchase of any government annuity, as ordered by the above award, was ever made.

In April, 1869, Madame *D'Alteyrac* was adjudicated a bankrupt.

In August, 1870, Lord *Willoughby* died. Up to this date half-yearly payments in respect of the annuity of £1200, and monthly payments of £100, had been regularly made to Madame *D'Alteyrac* and her assignees; but no such payment had been made since.

In September, 1870, the present suit was instituted by a creditor, for the administration of Lord *Willoughby's* estate; a decree was made in the November following; and in March, 1871, a claim was brought into Chambers by the assignees in bankruptcy.

The claim now made at the bar on behalf of the assignees was for two sums, viz., £600, being the half year's payment of the annuity which fell due on the 1st of October, 1870; and £700 being an aggregate of seven monthly payments due respectively

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on the last days of every month from August, 1870, to February, 1871.

The claim was resisted on two grounds, one a question of fact, whether or not the Countess had refused to furnish such evidence as to her age as was necessary to render possible the purchase of the annuity; the other, a question of law, as to whether the monthly payments of £100 were to be regarded in the light of liquidated damages, or of a penalty only.

The view taken by the Court on the former question will be found stated in the judgment.

Mr. *Amphlett*, Q.C., and Mr. *Crossley*, for the assignees:—

The true construction of the award is, that these monthly payments were intended as a compensation for the Countess in case the testator should fail to fulfil his obligations under the award. It was thought that, if the testator omitted to purchase the annuity and convey it to the trustees, the Countess having, instead of realised property, only the personal security of a tenant for life, would suffer damages to an extent beyond what any jury would be willing to assess. The event has happened that the testator did omit to purchase and legally secure the annuity; and it is impossible now to estimate how much the estate of the Countess has suffered from the omission. To meet this difficulty, the amount of damages, namely, £100 a month, is fixed by the award, *i.e.*, by agreement between the parties themselves: *Rolfe* v. *Peterson* (1), and other cases cited in the argument in *Sloman* v. *Walter* (2).

The award is, in fact, a contract in the alternative—either to purchase and settle an annuity, or to pay an annuity, plus £100 a month, until purchase and settlement.

The case of *Rolfe* v. *Peterson* also shews that the occurrence of the word "penalty" will not make an engagement to pay a penalty in the strict sense of the word, where the meaning of the parties evidently was to fix a sum in damages.

[They also cited and commented on *Chitty* on Contracts (3).]

Mr. *Higgins*, Q.C., and Mr. *Gardiner*, for the Plaintiff:—

The award is not binding on the Court by reason of discrepancies

(1) 2 Bro. P. C. 436. (2) 1 Bro. C. C. 418. (3) Ed. 1871, p. 822.

between the award itself and the introductory matter. Where an arbitrator assigns motives and explains the grounds of his decision, the Court, if it finds inconsistencies, can go behind the award without bill filed.

Mr. *Kay*, Q.C., and Mr. *Simmonds*, for the Defendant, the executor:—

This award comes within the well-settled rule, that where a sum is ordered to be paid by way of penalty, this Court will relieve against it, to the extent of everything beyond actual damage incurred: *Chitty* on Contracts (1).

Here the intention of the arbitrator was to secure the payment of an annuity of £1200 a year. He expressly declares that the additional payments are to be regarded as a penalty for "delay." The only case in which it is said that a payment described as a penalty shall not be dealt with as such, is that of breaking up pasture lands in breach of covenant in an agricultural lease.

Moreover the default of the Plaintiff in the action to furnish the necessary information has excused the payment of the penalty: *Bryant* v. *Beattie* (2).

The VICE-CHANCELLOR:—To what do you say the claim of the assignees should be limited?

Mr. *Kay*:—To a claim for the price of a government annuity of £1200 a year, and for such damages, if any, as the Court shall think fit to award for the delay in the purchase of the annuity.

SIR JAMES BACON, V.C.:—

I think the case is sufficiently clear to make it unnecessary for me to call upon Mr. *Amphlett* for a reply.

The award is in very plain terms, and although the word "penalty" occurs, that cannot be treated as creating a penalty in the strict sense of the word, but it must be taken in the sense in which it is used, consistently with all the other provisions of the award.

Nor can I go into any inquiry as to what were the motives of the arbitrator, or what he intended, further than to observe that,

(1) Pages 819–821. (2) 5 Scott, 751.

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as I read the terms of the award, they are plainly referable to the circumstances which have been mentioned in the course of the argument.

The object of the award was to provide, by a secured annuity, £1200 a year for this lady. With that view the arbitrator directs, orders, and awards, that the testator shall purchase such an annuity; and then, in order not to leave the claimant without present provision, but to provide, although not in words, yet in substance, for that which might happen, and which has happened, namely, delay and default on the part of the testator in procuring the annuity—a present payment of £100 a month is directed to be made. Whenever the testator thought fit, he might have relieved himself from the obligation of that payment by performing the other branch of the award, namely, the purchase of a government annuity. Nothing can be clearer and plainer. "Penalty" it is, but penalty in order to secure the performance of the other branch of the award, with perfect power and liberty for the person upon whom the burden is cast to relieve himself from that penalty or additional payment whenever he shall think fit. That is not a penalty which Courts of Common Law or Courts of Equity can allow to be relinquished or satisfied, except upon the terms of performing that very thing which the introduction of the "penalty" (I call it by that name since that has been preferred by the opponents to this claim) imposes in order to effectuate it. Is there a trace of Lord *Willoughby d'Eresby* ever in his life having applied to the Government Commissioners for the Reduction of the National Debt? or any proof that, then or now, there ever was or is any intention whatever of performing the award upon the second branch, that is, of providing a secured annuity—one that shall not depend upon personal obligation, but a secured annuity —for the term of this lady's life?

It was said by Mr. *Kay* in his argument, and it was also urged by Mr. *Higgins*, that since there was something incumbent upon this lady to do, and as she had not done that thing, therefore she cannot complain. In my opinion that is merely inverting the rights of the case. No doubt there is something for her to do. If the testator, or those who now represent him, had gone to the Government Office and bargained for the terms of an annuity, there

being no doubt about the identity of the person who is to receive the annuity, and no reasonable doubt about her age, since it appears the testator had in his possession a certificate shewing what her age was, and there had turned out to be an inaccuracy in the register, that inaccuracy might have been removed by other evidence. If they had gone to the Government Office, and bargained for the price of the annuity, and all that remained had been to comply with the requisitions of the statute, or any other regulations which the Government Commissioners may have established, their next step would have been to say to the claimant, "Now you must help us with this evidence; we have to prove that you were born at the time mentioned, and you must tell us how we can clear up the difficulty and inaccuracy contained in the baptismal certificate, which can be done by a declaration, or upon any other proper evidence." No such thing has ever been done in any step in the cause. The claimant, on her part, says, "Whenever you are ready, whenever you have got the contract for the purchase of the annuity, I will do all that is incumbent upon me."

Mr. *Kay* has endeavoured, by referring to the case of *Bryant* v. *Beattie* (1), which he thought had some analogy to this, to shew that there has been some default on the part of the claimant; and that, by reason of that default, the promissor is absolved from the performance of his engagement. I find no trace of any such thing in point of fact. I see no reason why now the government annuity cannot be purchased. I know nothing about the condition of the estate. If it cannot be purchased, then there must be a claim for the damage which has been sustained, and which may be hereafter sustained, by reason of the government annuity not having been bought, and of there being no security for the payment of that amount.

Then the other sum of £100 a month becomes payable by the very contract between the parties; and I adopt no violence of expression when I say "contract," for the award amounts to a contract between the parties.

I find in the correspondence what I cannot help thinking is the real state of the case. It is discovered, from the certificate coming from *Guienne*, that there is a mistake in the names of some of the

(1) 5 Scott, 751.

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persons mentioned in the register. That is a difficulty which the Respondents in this case say must be removed by the claimant. I do not think so at all. I think the claimant must do everything incumbent upon her for the performance of the undertaking; but I do not think that she is obliged to do any more. Whatever she may be obliged to do, she cannot be required to do it until something plain and definite is tendered to her, the non-performance of which can be imputed to her as a fault. The objection seems to me to rest entirely, as I have said, upon an ingenious notion, which has nothing but its ingenuity to recommend it, that by reason of these defects in the evidence the claimant is in such a position as that she is to be held at the staff's end, and that her just demands shall be defeated if possible, or at all events postponed.

I think that the award is a perfectly clear award. I think that the claimant is entitled to the £1200 a year awarded to be paid to her by means of a government annuity, and to the payment of £100 per month until that is purchased, and no longer. After that all notion of penalty will cease.

What is it the assignees precisely claim for?

Mr. *Amphlett*:—We claim for the £600 and the £700 as present debts. We also claim future payments of the £1200 a year, and of the £100 a month until the annuity shall be secured. We make no claim now for a capital sum; if the estate should be insolvent, we may have to prove for the value of the annuity as a capital sum; but the Court will not deal with that now. The future payments will be dealt with in the same way as other annuities are dealt with.

The VICE-CHANCELLOR assented.

The costs of all parties, those of the executor as between solicitor and client, were ordered to be paid out of the estate.

Solicitors for the Claimant: Messrs. *Bailey & Child.*
Solicitors for the Plaintiff: Messrs. *Lumley & Lumley.*
Solicitors for the Defendant: Messrs. *Travers-Smith & Co.*

In re BEULAH PARK ESTATE.

V.-C. B.
1872
Nov. 9.

SARGOOD'S CLAIM.

Unlimited Company—Winding-up—Creditor—Surety—Rate of Interest.

A trustee for a company, who pays money on behalf of the company under a contract by which he was legally bound to make such payment, is in no worse position than a stranger who makes advances; and is entitled, in the winding-up of the company, to interest at £5 per cent. on his debt.

17 Eq 556
2 Ch D. 774

ADJOURNED SUMMONS.

This was a claim in the winding-up of an association, called the *Beulah Park Estate*, on behalf of *Frederick James Sargood*, for sums amounting to £4308 18*s.* 6*d.* and interest.

By an agreement dated the 28th of February, 1866, a messuage and lands at *Norwood* were agreed to be sold to and purchased by *Bernard Engel*, the claimant *Sargood*, and *Lewis Frederick Edwards*, for the sum of £45,210, of which it was agreed that £30,000 should remain on the security of the property; and by another agreement, dated the 6th of March following, and made between *Engel*, *Sargood*, and *Edwards* of the one part, and sixteen persons, including the same *Engel*, *Sargood*, and *Edwards*, of the other part, after reciting the last-mentioned agreement, and that the same was entered into by *Engel*, *Sargood*, and *Edwards*, as well on behalf of the other parties thereto of the second part as of themselves, it was agreed (amongst other things) that *Engel*, *Sargood*, and *Edwards* should "stand possessed of the agreement of the 28th day of February, 1866, and the property therein comprised, and the rights and benefits arising therefrom respectively, upon trust for the said several persons parties hereto in the proportions hereinbefore mentioned, and shall dispose thereof in such manner as the several persons parties hereto, or the majority of them, shall from time to time determine." It was also agreed that "the several persons parties hereto shall indemnify, in the "proportions hereinbefore mentioned," *Engel*, *Sargood*, and *Edwards* "from and against all costs, losses, damages, expenses, claims, and demands which they or any or either of them may sustain or incur, in relation or incident

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to the said recited agreement." It was also agreed that the adventure should not "constitute, or be considered as constituting, a partnership between the several persons parties hereto, or any of them, nor shall any one or more of them have authority to pledge the credit of the others or any of them."

Twenty-one shares in the adventure were subscribed for by the sixteen members, a Mr. *Usborne* taking four, *Sargood* taking three, and the rest one each.

On the 16th of April, 1866, an indenture of conveyance and mortgage was executed, whereby the messuage and lands were conveyed to *Engel*, *Sargood*, and *Edwards*; and then were mortgaged by the same persons to the vendors, to secure the repayment of £30,000 and interest at the rate of £4 per cent.

Under this deed advances were from time to time made by *Sargood*, on behalf of the association, to the mortgagees on account of principal and interest, amounting together to £3308 18*s.* 6*d.*

In December, 1868, another agreement was entered into by *Engel*, *Sargood*, and *Edwards*, on behalf of the association, for the purchase of another piece of land in the parish of *Croydon*, for the sum of £2000, payable as follows: £200 by way of deposit upon signing the contract, and £500, £500, and £800, within six, twelve, and twenty-four months after possession of the property should be given, with interest thereon in the meantime at the rate of £5 per cent.

Under this contract sums to the amount of £1000 were advanced by *Sargood* on behalf of the association.

On the 10th of June, 1871, the association (which was unlimited) was ordered to be wound up.

Several questions occurred on the summons, but the only point now argued was, whether *Sargood* was entitled to £5 per cent. on the two sums of £3308 18*s.* 6*d.* and £1000, or to £4 per cent. only.

In the course of the discussion it was admitted as to the £1000 that he must be entitled to £5 per cent.

Mr. *Kay*, Q.C., and Mr. *Locock Webb*, for the claimant:—

That Mr. *Sargood* is entitled to be reimbursed his advances, and if so, with interest at the ordinary commercial rate, viz., £5 per

cent., appears from the following authorities: *Ex parte Chippendale, In re German Mining Company* (1); *Murray's Executors' Case* (2); *Ex parte Bignold* (3); *Troup's Case* (4); *Hoare's Case* (5). At any rate, he must be entitled to what he has saved the association on the second contract.

Mr. *Eddis*, Q.C., and Mr. *Maidlow*, for the contributories:—

We cannot dispute Mr. *Sargood's* right to interest, nor his right to £5 per cent. interest on the second contract: *Small* v. *Wing* (6).

But as to the rest, the argument that Mr. *Sargood* is to have recouped to him what he has saved to the company would, *à converso*, give him only £4 per cent., that being the rate of interest in the mortgage deed.

In the ordinary case of a stranger voluntarily advancing money to a company, it may be that he is entitled to £5 per cent., but does the rule extend to the case of a man paying money which he has bound himself to pay; in other words, to the case of payment of an ordinary debt? *Evans* v. *Wood* (7). In a suit for contribution between co-sureties, the Plaintiff gets only £4 per cent. interest: *Lawson* v. *Wright* (8).

SIR JAMES BACON, V.C.:—

I cannot see why a surety who pays the debt of his principal should be in a worse position than a stranger who advances money.

I think these advances made by Mr. *Sargood* must be treated as ordinary money transactions, and that he is entitled to £5 per cent. interest upon them.

Claim allowed.

Solicitors for the Claimant: Messrs. *Lawrance, Plews, Boyer, & Baker.*

Solicitors for the Contributories: Messrs. *Morris, Stone, & Co.*

(1) 4 D. M. & G. 19, 43, 54.
(2) 5 Ibid. 746, 753.
(3) 22 Beav. 143.
(4) 29 Ibid. 353.
(5) 30 Beav. 225.
(6) 5 Bro. P. C. 66, 72.
(7) Law Rep. 5 Eq. 9, 15.
(8) Seton on Decrees, p. 562; 1 Cox, 275.

V.-C. B.

1872

Nov. 14.

In re UNITED MERTHYR COLLIERIES COMPANY.

Adjoining Coal Mines—Trespass—Measure of Damages for Coals wrongfully taken—Mode of taking Account.

Where coal has been wrongfully taken by working into the mine of an adjoining owner, the trespasser (in the absence of any suggestion of fraud) will be treated as the purchaser at the pit's mouth, and must pay the market value of the coal at the pit's mouth, less the actual disbursements (not including any profit or trade allowances) for severing and bringing it to bank, so as to place the owner in the same position as if he had himself severed and raised the coal.

IN this case an order was made on the 19th of December, 1871, upon the application of the *Powell Duffryn Steam Coal Company*, allowing their claim against the *United Merthyr Collieries Company* in liquidation "for such an amount as is equal to the value, according to the average price of steam coal from the *Abergwawr* pit in 1864 and 1865, at the pit's mouth, of 16,932 tons of coal, after deducting therefrom the actual cost of severing the said 16,932 tons of coal, and the actual cost of carrying the same to the pit's mouth, such deductions to be settled by the Judge in case the parties differ."

The coal in question had been wrongfully taken by the *United Merthyr Company* from the adjoining colliery of the *Powell Duffryn Company* by working beyond their boundary.

When the matter came on in December, 1871, upon the claim of the *Powell Duffryn Company*, as creditors under the winding-up of the *United Merthyr Company*, for the value of the coal taken from within their boundary, His Honour was of opinion that the case of trespass was clearly proved against the *United Merthyr Collieries Company*, but that as there was no suggestion of fraud it was a case for the application of the more lenient rule, and accordingly that they must pay the value of 16,932 tons of coal at the pit's mouth, deducting the cost of severance and the cost of carrying to the pit's mouth (1).

(1) SIR JAMES BACON, V.C.:—

In cases of fraud, of course, there can be no doubt. In cases even partaking of fraud there can be no doubt. I am not quite sure that I understand what is meant by the learned Judge who

When the matter was before him in Chambers, the Chief Clerk decided that, under the order, the *United Merthyr Company* were not entitled to any deductions beyond the bare expenses of severing, banking, and raising up, taking the words in their literal sense.

The liquidators of the *United Merthyr Company* now moved that the Chief Clerk might be directed, in proceeding on the order of the 17th of December, 1871, and in ascertaining the actual cost of severing the 16,932 tons of coal, and the actual cost of carrying the same to the pit's mouth, to include all the working expenses incurred by the *United Merthyr Company* in bringing the coal to bank, including therein not only the money paid for cutting, banking, and raising the said coal, but also the wages, cost of wear and tear, and consumption of material and stores, without which

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uses that word "negligence" (Baron *Parke* in *Wood* v. *Morewood* 3 Q. B. 440, n.), nor to what extent that may be carried; but what weighs with me in this case is, that I find in the Lord Chancellor's observations (*Jegon* v. *Vivian*, Law Rep. 6 Ch. 742) a strong disposition to apply what he calls the milder rule of law whenever it can possibly be done. Here there is no suggestion of fraud that I can attend to.

There has been no evidence relating to it, and it may have been a mere mistake. But what also weighs with me greatly is this. The claimants are themselves owners of mines. They seek their profit by severing the coal in the mine and bringing it to the surface and then selling it. If they had been undisturbed in the possession of which they now complain they must have incurred an expense in severing the coal before they could have made a profit. The mere disbursement, then, which has been made by the *United Merthyr Company* in severing the coal is doing no wrong that I can see to the claimant; but I repeat that if there was the slightest colour of fraud, or anything like unfair dealing in the matter, I should be disposed, notwithstanding the authorities I have referred to, to hold that the case came within the rule which enables the Court to fix the largest amount of compensation. I regret that there is not a plainer rule upon the subject. It ought not to be left to the judgment of individual Judges as to what is the rule to be applied to trespasses of this kind. Still, as I find the law in a certain state of confusion, and the more mitigated rule having been greatly favoured, not only by the observations of the Lord Chancellor, but in the other case (*Wood* v. *Morewood* 3 Q. B. 440, n.) decided by the late Mr. Baron *Parke*, I think that the cost of merely severing —the actual disbursement—must be deducted from the sum which the claimants are entitled to. They could not have had the gain which they proposed to themselves unless they had undergone that expense. They get the value of their property with a deduction for that which, if the trespass had not been committed, they would have had to bear.

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the coal could not have been brought to the pit's mouth, but not including any proportion of the expense of sinking the shaft, or any other capital expenditure, or any interest on capital expenditure.

Mr. *Eddis*, Q.C., and Mr. *A. Dixon*, in support of the motion:—

The question is, what costs and expenses are attributable to the severance and bringing of the coal to the pit's mouth. In the absence of fraud or negligence on the part of the trespasser, he has been treated as if he had been the purchaser of the coal at the pit's mouth, and from the purchase-money payable to the owner as compensation will be deducted all fair and just allowances in respect of the cost of getting and raising such coal: *Powell* v. *Aiken* (1); *Wood* v. *Morewood* (2); *Morgan* v. *Powell* (3); *Hilton* v. *Woods* (4); *Jegon* v. *Vivian* (5); in which cases the more lenient form of account was directed in place of the stricter form—giving no allowance for getting the coal—adopted in *Phillips* v. *Homfray* (6); *Llynvi Company* v. *Brogden* (7); *Martin* v. *Porter* (8).

All we want is, that in working out the order the Chief Clerk shall make us all just allowances for our charges and expenses on account of severance, and also on account of carriage to the pit's mouth.

Mr. *Kay*, Q.C., Mr. *Charles Hall*, and Mr. *Bidder*, for the *Powell Duffryn Company*, were not called on.

Sir James Bacon, V.C:—

I have not the slightest intention of interfering with or departing from the decisions which have been mentioned to me, especially in the more recent cases, because, as I recollect, there was want of exact agreement between some of the common law cases and some of those which had formerly been decided in this Court. I take the difference now to be entirely removed and the rule to be clearly and plainly established, and so understanding, I made the order in this case. The words which are supposed to have been used are

(1) 4 K. & J. 343.
(2) 3 Q. B. 440, n.
(3) Ibid. 278.
(4) Law Rep. 4 Eq. 432.
(5) Law Rep. 6 Ch. 742.
(6) Ibid. 770.
(7) Ibid. 11 Eq. 188.
(8) 5 M. & W. 351.

"actual cost and expenses"—the word that has been read from the short-hand notes is "disbursements." In my opinion there is not the slightest doubt about the meaning of either of those expressions. It is said that the trespasser must be treated as if he had been the purchaser. Now that must be taken with a certain qualification. It is a useful illustration of what the Court meant to decide in the particular case where that expression is to be found; but the principle of the decision is that the Plaintiff, although he has suffered a wrong, shall not have any more than he would have had if that wrong had not been committed. That I take to be the clear and plain principle. If he had himself severed the coal, he could only have done so by means of disbursements. If he had brought it to the pit's mouth when severed, he could only have done so by means of disbursements. If he himself had severed and brought the coal to the pit's mouth, whatever the value of it might then be would have to be deducted, because he would have borne the expenses on both these heads, which would have been actual disbursements, not profit; nor do "just allowances" mean profit; but if I were to change the words of the order, I might leave it doubtful, or might open up some ground for argument, as to what is meant by "just allowances."

The order has been settled, not without the knowledge of both parties, and when I am asked to interpret the words of it, I have the means of doing so distinctly by reference to the shorthand notes in which the word "disbursements" occurs. There can be no doubt as to what "the actual cost" means. The trespasser is not to charge as if somebody else had employed him to sever. If he had paid a certain sum to his workmen, and by the custom of the trade was entitled to charge a certain other sum, he is not to have the larger sum. The Plaintiff is to be put in the same situation as he would have been in, neither better nor worse, if he himself had severed the coal and brought it to the pit's mouth. That must have been done, and could only have been done by means of disbursements, not by any profit, not by any allowance in the trade, not by any artificial mode of guessing at it; but the books he must have kept would shew how much money he spent in severing the coal, and how much money he spent in bringing it to the pit's mouth. My opinion is that the matter is perfectly clear, and that I

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V.-C. B. 1872 *In re* United Merthyr Collieries Company.

could not usefully or properly alter any one part of the order. Now I see no difficulty in working out the order. When the Chief Clerk has taken the account, if he takes it rightly, there is an end of it. If he takes it wrongly, and does not allow that which is just, the persons who have a right to complain may then complain. At present I cannot interfere in the slightest degree, although I do not hesitate to say now (notwithstanding what has been said by Mr. *Eddis*) what I meant by the judgment I then pronounced, and what, in my opinion, is the meaning of the words used in the order.

His Honour added that he had no reason to doubt that the *Merthyr Company*, in the course of their working the mine, kept books of account, wages books, and other books; and any person looking into those books could extract from them every farthing which had been spent (it was disbursement that he was speaking of) in working the coal. What was spent in bringing it to the pit's mouth, wages or whatever else it was, could by the same process be ascertained. He was satisfied that upon principle and in fact there could be no difficulty in ascertaining what the Plaintiff would have had to pay out of his pocket if he had severed the coal and brought it to the pit's mouth, and that amount, whatever it was, the *Merthyr Company* had a right to have deducted from the value of the coal at the pit's mouth for which the company were made answerable to the Plaintiff.

Solicitors: Messrs. *Tatham, Curling, Walls, & Pym*; Messrs. *Williamson, Hill, & Co.*

FORBES *v.* ECCLESIASTICAL COMMISSIONERS FOR ENGLAND.

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1872
Nov. 7.

[1872 F. 58.]

Demurrer—Grant by Ecclesiastical Commissioners—Waste Lands—Customary Rights—Village Green—51 Geo. 3, c. 115, s. 2.

The 2nd section of 51 Geo. 3, c. 115, does not enable grants overriding any customary rights other than rights of common and manorial rights of a like nature.

The Ecclesiastical Commissioners, as lords of the manor of *B.*, in the parish of *M.*, granted to the Vicar of *M.*, under the 51 Geo. 3, c. 115, s. 2, part of the waste of the manor for a burial ground. To a bill filed on behalf of the parishioners setting up a customary right to this part of the waste as a village green, and seeking to set aside the grant, a demurrer was overruled.

THIS bill was filed by *J. H. Forbes,* on behalf of himself and all other the inhabitants of the parish of *St. Mary Extra,* in the county of *Southampton,* praying for a declaration that the inhabitants of *St. Mary Extra* are entitled to use the whole piece of ground known as *Pear Tree Green,* in the said parish, for enjoyment and exercise, amusement and recreation, and for all lawful village sports, games, and pastimes; and charging that the grant of part thereof made by the Defendants to the vicar for a burial ground was void; and that they are not entitled, under the 51 Geo. 3, c. 115, or otherwise, to inclose any part of the said green, or in any way to interfere with the right of the Plaintiff and the inhabitants; and also for an injunction.

The bill was filed against the Commissioners, who were also lords of the manor of *Bitterne,* within which the land in question was situate, and against the Rev. *T. L. O. Davies,* the vicar, who demurred to the bill.

The bill stated that within the parish there is a piece of land, formerly part of the waste of the manor of *Bitterne,* known as *Pear Tree Green,* which from time immemorial has been used by the inhabitants for recreation. That in the year 1617 a chapel was built on the green, and a piece of *Pear Tree Green* surrounding it was inclosed for a burial ground.

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In 1812 an Act of Parliament (52 Geo. 3, c. 127) was passed for inclosing land in the parish of *St. Mary Extra*, and of an adjacent parish. The Act recited that there were upwards of 800 acres of commonable land, and by the 23rd section the Commissioners were authorized and directed to allot one-sixteenth part in value of the commonable lands to the Bishop of *Winchester*, as lord of the manor of *Bitterne*, as compensation for his interest in the said wastes. By the 25th section, it was enacted that when the said allotments to the bishop and certain others had been assigned, the remainder of the said commons (except a part numbered 13 in the plan, containing about 14A. 3R. 0P., leading to *Pear Tree Green*, and except *Pear Tree Green* itself, containing about 13A. 3R. 8P.) should be allotted among the proprietors.

The provisions of the Act were carried into effect, and *Pear Tree Green* remained uninclosed, and the inhabitants continued to enjoy their customary rights. In 1846 a small portion of the green was added to the burial ground with the consent of the inhabitants. In 1867 additional burial ground was required, and it was proposed to purchase from a Mr. *Chamberlayne* a plot of two and a half acres, which he was willing to sell for £50, and which sum a gentleman in the neighbourhood was willing to contribute; but this arrangement (as the bill alleged) was opposed by a few parishioners who presented a memorial to the Defendants, who had become lords of the manor in lieu of the Bishop of *Winchester*, requesting them to enlarge the present burial ground by taking about one acre and three-quarters from *Pear Tree Green*. The Commissioners at first declined to do so, and approved of the proposed purchase from Mr. *Chamberlayne;* but subsequently, as it appeared, in consequence of the Bishop of *Winchester's* advice, they, shortly before the 22nd of May, 1872, affixed their seal to a deed granting to the vicar a portion of *Pear Tree Green* for enlarging the burial ground. The Plaintiff thereupon denied the power of the Commissioners to make the grant, and shortly afterwards filed this bill, in which he charged that the Defendants were not authorized to make the grant. The statute, 51 Geo. 3, c. 115, s. 2, on which the Defendants relied, is briefly as follows:—

That it should be lawful for any person or bodies, politic or corporate, seised of or entitled to the absolute and entire fee

simple of any manor by deed under their hand and seal inrolled in Chancery, to grant to the minister of any parish and his successors any parcel not exceeding in the whole five statute acres, parcel of the waste of such manor, and lying within the parish where such church or chapel shall be or shall be intended to be erected, or within any extra-parochial district wherein any such chapel shall be or shall be intended to be erected, for the purpose of erecting or enlarging any such church or chapel, or for a churchyard or burying ground, or enlarging a churchyard or burying ground, for such parish, or for such extra-parochial place, or for a glebe for the minister of such church or chapel, to erect a mansion house thereon, or to make other conveniences for the residence of such minister, freed and absolutely discharged of and from all rights of common, and any statute prohibiting any alienation in mortmain, or other statute or custom to the contrary notwithstanding. Then followed a provision that such church or chapel must be used only for the service of the United Church of *England* and *Ireland*.

Mr. *Chitty*, for the demurrer:—

The question really turns on the meaning of the word "custom," and that must be gathered from the nature of the Act and the connection in which the word is found. Custom in this Act must mean general law, because otherwise the Act would or might be inoperative. In such a case the Court must look at the Act itself, as authorities are of little weight.

The claim to protect a village green as such is out of the question. A village green as such is unknown to the law except as a part of the waste land of a manor.

Mr. *Lindley*, Q.C., and Mr. *Maidlow*, for the bill:—

The case turns on the construction of the 51 Geo. 3, c. 115, s. 2. The power given is "to grant free and absolutely discharged from all rights of common;" but that does not authorize the lord to override other rights. Rights of common are things well known and defined, and this power extends to no other. *Expressio unius est exclusio alterius.*

The words that follow the power, "any statute prohibiting mort-

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main, or other statute or custom to the contrary notwithstanding," merely give a sanction to the previous enacting part, but add no additional powers. It was as if the words had been at the beginning of the section, "notwithstanding the Mortmain Acts, and shall be lawful to grant land freed from all rights of common."

This view will fully satisfy the language of the statute. The statute law, or custom, mean only such law or custom as would prevent the lord from overriding the rights of common. The *Statute of Merton*, which required the lord to leave sufficient pasture, would be one law. The law laid down in *Fawcett* v. *Strickland* (1), and *Shakespear* v. *Peppin* (2), that a lord may not inclose common of piscary or turbary, and in *Arlett* v. *Ellis* (3), as to rights of common, would be cases to satisfy the words of the statute.

If the Act intended to override all customary right, it would include a right to hold a market, which would hardly be contended. If the Defendant's construction be right, it would enable the lord to abolish any public right to a highway; but that never could be the intention of the Legislature.

But, further, it is not clear that a village green falls within the words "parcels of the waste of a manor." "Village greens," or "town greens," are referred to in express terms by the *General Inclosure Act*, 8 & 9 Vict. c. 118. It is true that the rights of recreation over them may be supported by custom, *Abbot* v. *Weekly* (4), but the character of the ground has so changed that it could not properly be described as "parcel of the waste": *Dyce* v. *Lady Hay* (5), and Lord *St. Leonards'* observations on that case.

The only rights which the lord can override under this statute are manorial rights, and no others. This would give a rational interpretation of the statute, having regard to the connection between the lord and his tenants.

No such presumption of a common interest exists between the lord and a stranger.

SIR JOHN WICKENS, V.C.:—

The question is, whether the language of the 2nd section of the

(1) Willes, 57.
(2) 6 T. R. 741.
(3) 7 B. & C. 346, 367
(4) 1 Lev. 176.
(5) 1 Macq. 305, 307.

statute, 51 Geo. 3, c. 115, authorizes the lord of a manor to discharge the land of manorial rights only, or whether they are to have a more extensive meaning. It is contended that the statute authorizes a lord of a manor to grant the lands discharged not only of manorial rights, but also of public or customary rights. In my opinion the statute gives no such authority. The language of the statute will be fully satisfied by interpreting it to mean—what indeed is the plain and natural meaning of the words used—"a power to grant the lands discharged of all rights of common and manorial rights of a like nature." To hold otherwise would be to destroy by a side-wind public rights which were not in the contemplation of the Legislature. The demurrer must therefore be overruled.

Solicitors for the Plaintiffs: Messrs. *Lee & Best.*
Solicitors for the Commissioners: Messrs. *White & Borrett.*
Solicitors for the Vicar: Messrs. *Shum & Crossman.*

STOCK *v.* McAVOY.

[1870 S. 128.]

Advancement—Reservation of Interest by Donor—Rebuttal of Presumption—Purchase by a Father of Copyholds.

A father purchased a copyhold cottage in the name of his son. Shortly after the purchase the father served notice to quit on an occupying tenant, but afterwards allowed her to remain at an increased rent, and during his life received the rents and paid the outgoings:—

Held (notwithstanding evidence of declarations that the cottage was the son's after his father's death), that the purchase was not an advancement.

ON the 9th of November, 1860, *Philip McAvoy*, the testator, purchased with his own moneys a copyhold cottage, called *Rose Cottage*, near *Woodford Bridge*. The testator's son, *Thomas McAvoy*, was by his direction admitted tenant on the Court Roll, but the father paid the fine, £15, and £2 13*s.* 4*d.* quit rent. He had previously been living at *Chigwell*, and was in want of a residence. He shortly afterwards called on the then tenant of the cottage, a Mrs. *Sutton*, and gave her notice to quit, at which she

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was very much distressed. A few days afterwards, she called on the testator, and informed him she was unable to find any other residence, and seemed so much affected at leaving the house, that the testator consented to allow her to remain at a rent of £18 instead of £12, which she had previously paid. The testator always received the rents and applied them to his own use, and the receipts were generally, but not invariably, made out in the name of the son. The testator always paid the quit rent and the cost of the repairs of the cottage out of his own moneys, and always treated the cottage as his own property. The testator died on the 2nd of August, having by his will directed his wife and his son *Thomas McAvoy*, whom he appointed executrix and executor of his will, to convert into money his estate (other than his freehold, copyhold, and leasehold estate), and to invest the same, and to pay the produce of the fund and of his real estates to his widow for life, remainder to his son for life, remainder to his son's wife for life, and then to hold the same on trust for the children of his son *Philip*. The will was duly proved. The testator died in 1870, and a bill was afterwards filed to administer his estate, and on the 23rd of July, 1870, an administration decree was made, with an inquiry, *inter alia*, of what freehold, copyhold, and leasehold estate the testator died possessed of. Shortly after the bill was filed *Thomas*, the son, died, having devised his real estate to his widow. The Chief Clerk, by his certificate, dated the 5th of May, 1871, found that *Rose Cottage*, let to a Mrs. *Sutton*, formed part of the testator's estate; but added a note that it was claimed by the widow of the son *Thomas*, who was the devisee.

The widow of *Thomas* took out a summons to vary the Chief Clerk's certificate, and the matter now came before the Court on that summons, and on further consideration.

In addition to the facts above stated, there was a great deal of evidence as to the declarations by the testator. The son's widow stated that she had heard testator tell his son that he was to consider *Rose Cottage* his own on testator's death, and that he, testator, had bought it for him, and intended it for the son's benefit after testator's death; that the son was admitted tenant to save the expense of a fine; that she well recollected testator, two or three days before his death, saying to *Thomas*, when he was talking of

his affairs, "There is that *Rose Cottage*, my boy, I wish you to take the rent of that directly: no one can dispute your right to that."

The testator's widow stated that the son *Thomas* was admitted tenant to save the expenses of a fine, as he would probably outlive his father and mother. On one occasion she remembered testator saying, "You are a young man, *Tom*, and we are old; so I will take it (the cottage) up in your name, and that will save money when we are gone." Several other witnesses gave evidence of declarations by the testator that he purchased the cottage for his son.

Mr. *Colt*, for the summons:—

This case is well within the authorities. In *Dyer* v. *Dyer* (1) copyholds were purchased by the father, and were granted by the lord to the father, his wife, and younger son, in succession. The father paid all the purchase-money, enjoyed the property for his life, and then by his will devised to another son. The devisees of the father filed a bill, alleging that there was a resulting trust to the testator, but the Court held that the transaction was advancement.

This is almost exactly the present case. It is impossible to suggest any reason why the son should have been admitted tenant, except for his own benefit. In *Finch* v. *Finch* (2) Lord *Eldon* said that *Dyer* v. *Dyer* was fully considered, and was intended to settle the law, "and that the principle of law and presumption was not to be frittered away by nice refinements."

Then it was said that, the father having received the rents, the presumed advancement must be held to be rebutted; but that was not the doctrine of this Court: *Taylor* v. *Taylor* (3). So in *Grey* v. *Grey* (4) the father was the owner of the money, received the profits for twenty years, granted leases, took fines, inclosed and built on the land, gave directions for selling it, treated for the sale, but yet it was held an advancement. *Murless* v. *Franklin* (5) was to the same effect. On these authorities it is clear that *Rose Cottage* is the property of the son's devisee.

(1) 2 Cox, 92.
(2) 15 Ves. 43–50.
(3) 1 Atk. 386.
(4) 2 Sw. 594.
(5) 1 Sw. 13.

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Mr. *W. Pearson*, and Mr. *Maidlow*, opposed the summons:—

Either this is an advancement or it is not, as there can be no intermediate case. If it is not an advancement, there must be a resulting trust for the purchaser.

But whatever might be the ultimate intention, if any prior interest was reserved for the life of the purchaser, it is not an advancement within the rule: *Dumper* v. *Dumper* (1); *Bone* v. *Pollard* (2); *Williams* v. *Williams* (3). The only admissible evidence must be contemporaneous.

The decisions shew that evidence of the purchaser's intention must be contemporaneous with the purchase: *Murless* v. *Franklin* (4). Here all the admissible evidence shews that the intention was that the father was to have a prior life estate, and therefore there is no advancement.

Secondly, the evidence clearly shews that in this case the testator retained possession so ostensibly as to get rid of the difficulty to be found in some of the cases. This of itself shews that there was no advancement.

Mr. *Colt*, in reply:—

Bone v. *Pollard* is no authority on the question of advancement, the father, in that case, having become incapable of superintending his business (that of a farmer), and the capital was consequently transferred into the daughters' names jointly. All the facts negatived the idea of any advancement. *Williams* v. *Williams* is really an authority in the son's favour, for it shews that the receipt of rents by the father does not rebut the presumed advancement.

SIR JOHN WICKENS, V.C.:—

Where a father purchases property in the name of his son, without making any formal declaration of trust, it is either a gift to his son absolutely or he is a trustee for his father. If the son is a trustee at all, he is wholly a trustee; but the strong presumption of law is that he is not a trustee at all; and it can only be displaced by evidence. In this case the father and son are both dead,

(1) 3 Giff. 583. (3) 32 Beav. 370, 375.
(2) 24 Beav. 283. (4) 1 Sw. 13.

and the admissible evidence consists of contemporaneous statements and acts, and of subsequent statements of either of them against the interest of the party making them.

It is said that the taking possession by the father at the time of the purchase is insufficient in general to rebut the presumption; but this does not, I conceive, apply where there is a formal and unmistakeable act of taking possession. Suppose a man bought a shop in his son's name, and immediately took possession and put his own name over the door, that would be an ostensible taking possession sufficient to shew ownership in the father and trusteeship in the son.

In this case the father called on the tenant, and gave notice to quit, but ultimately allowed her to remain. Perhaps I am not justified in treating that circumstance as a formal and unmistakeable act of taking possession by the father, sufficient to establish that he purchased for himself. But it is a circumstance of great weight, and looking at this and the rest of the evidence, I am of opinion that the Chief Clerk was right in finding that this was a trust and not an advancement. There must be a declaration that the son was a trustee for the father. The costs of the summons to be costs in the cause.

Solicitors for the Plaintiff: Messrs. *Morris, Stone, & Co.*
Solicitors for the Summons: Messrs. *Turner & Son.*

ALLSOPP *v.* WHEATCROFT.

[1871 A. 97.]

Covenant in restraint of Trade—Void if unnecessarily extensive.

A covenant by a clerk and traveller with a firm of brewers that he would not, during his service or within two years afterwards, either directly or indirectly, sell, procure orders for, or recommend, or be in anywise concerned or engaged in the sale or recommendation, either on his own account or for any other person, public company or corporation, of any *Burton* ale or porter brewed at *Burton*, or offered for sale as such, other than the ale, beer, or porter brewed by the Plaintiffs:—

Held, void, as unnecessarily extensive.

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IN January, 1862, the persons then constituting the firm of *Allsopp & Sons*, brewers, of *Burton-on-Trent*, entered into an agreement in

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writing with the Defendant, dated the 6th of January, 1862, which, so far as is material to the case before the Court, was as follows:—

"Whereas *Allsopp & Sons* have agreed to admit *W. Wheatcroft* into their service as clerk and traveller upon his entering into such agreements as are hereinafter contained, Now, therefore, in consideration of the premises, the said *W. Wheatcroft* doth hereby engage and agree to and with the said firm that he, *W. Wheatcroft*, shall well and truly, at the salary of £100 per annum, or at such other salary as shall be from time to time agreed upon, serve the said firm, notwithstanding any change in the partnership, as their clerk and traveller, from the day of the date hereof until such service shall have been determined as hereinafter mentioned; and that during the continuance of the said service *W. Wheatcroft* shall faithfully serve his said employers to the best of his knowledge and ability, and devote his whole time and attention to their service in the employment aforesaid; and that during the time he shall remain in such service he shall not sell nor engage in the sale of any other articles or goods of any description whatsoever, and that he shall from time to time, when thereto required of them, duly pay, hand over, and deliver to the said firm all moneys, securities for money, goods, articles, and things belonging to them, or collected or received by him on their account, or committed to his care for their use, and that the said *W. Wheatcroft* shall not at any time during his said service, or within two years subsequent to his quitting the same service, either directly or indirectly, sell, procure orders for the sale, or recommend, or be in any wise concerned or engaged in the sale or recommendation, either on his own account or for any other person or persons, or public company or corporation, of any *Burton* ale or beer or porter, or of any ale or beer or porter brewed at *Burton*, or offered for sale as such, other than the ale or beer or porter brewed by the said firm. And it is hereby mutually agreed by and between the said parties hereto that the said service may at any time hereafter be determined by three calendar months' notice in writing given by either of the said parties to either of them for that purpose: Provided always, and this agreement is upon this express condition, that *W. Wheatcroft* shall give and keep on foot during the continuance of his service security to be approved of by the said firm to the amount of £200 for the faithful service of

him, the said *W. Wheatcroft*, in his said employment. And unless such security be so given and kept on foot this agreement, on the part of the said firm, shall thereupon become null and void."

The agreement was signed by the Defendant (but not by the Plaintiffs), and he entered upon such service as traveller and clerk, in which capacity he continued in the service of the firm till August, 1866, when he was appointed manager, traveller, and agent at *Chesterfield*. He remained in such employment until the 1st of April, 1871, when, as the Plaintiffs alleged, he was dismissed for misconduct, but as he himself swore, he left of his own free will.

The Defendant's duties at *Chesterfield* were to have charge of the stores and to solicit orders in the neighbourhood.

The bill alleged that the Defendant, within the period specified in the agreement, had engaged himself as a traveller to another firm of brewers at *Burton-on-Trent*, and solicited orders on their behalf, and that the Plaintiff's business had suffered in consequence. The Defendant alleged in his answer that he had offered, since leaving the service of *Allsopp & Sons*, to sell to various persons the Plaintiffs' beers, but they had refused to supply him, and that, under the circumstances, he had entered the service of Messrs. *Cooper*, and solicited orders on their behalf.

A great deal of evidence was adduced on both sides as to the conduct of the parties and as to the meaning of "*Burton Ale*," but the Vice-Chancellor's judgment proceeded solely on the terms of the contract.

Mr. *Dickinson*, Q.C., Mr. *Lindley*, Q.C., and Mr. *Cookson*, for the Plaintiffs:—

The result of the cases seems to be, that although all restraint of trade, if there be nothing more, is invalid, *Mitchel* v. *Reynolds* (1), yet an agreement for a particular restraint may be good if, first, it be not unlimited; secondly, if it be for a good consideration; and thirdly, if it be only what is necessary for the reasonable protection of the covenantee. This principle would be found to reconcile all the authorities, a great many of which are collected in *Avery* v.

(1) 1 P. Wms. 181.

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Langford (1). In *Ward* v. *Byrne* (2) the question was very much considered, and the restraint in that case was held void; but because, from the nature of the trade, a coal merchant's business could not have required so extensive a restriction as was comprised in the agreement. In the *Leather Cloth Company* v. *Lorsont* (3), a covenant not to carry on a particular business in any part of *Europe* was held valid. It was argued in that case that this amounted to a restraint throughout the *United Kingdom*, and was bad, but Sir *W. M. James*, then Vice-Chancellor, observed (4) that in his opinion the effect of the authorities was not to establish an unrebuttable presumption against such a covenant, provided it were natural and not unreasonable for the protection of the parties contracting.

But even assuming that upon the language the restraint was unnecessarily extensive, it was nevertheless valid to a reasonable extent. In *Mallan* v. *May* (5) the covenant was that the Defendant should not practise in *London*, or in any of the places where the Plaintiffs might have been practising, before the expiration of the said service; and it was held that the stipulation not to practise in *London* was valid and the rest invalid. So in *Green* v. *Price* (6), where the covenant was not to carry on the business of a perfumer in the cities of *London* and *Westminster*, or within 600 miles of the same, the covenant as to *London* and *Westminster* was held valid, and the other part of it bad. These cases established the important principle that a covenant, in its nature reasonable and for valuable consideration, but unnecessarily extensive in its terms, is only void as to the excess. The reasonableness is a matter to be determined by the Court, and though it might be difficult in this case to define any area where the Plaintiffs' business would not be injuriously affected by a competition with a discharged servant, still an approximation might be made.

On these grounds the Plaintiff is entitled to a decree.

[They also cited *Mitchel* v. *Reynolds* (7), and the authorities there mentioned.]

(1) Kay, 663–667.
(2) 5 M. & W. 548.
(3) Law Rep. 9 Eq. 345.
(4) Law Rep. 9 Eq. 353.
(5) 11 M. & W. 653.
(6) 13 Ibid. 695; 16 Ibid. 346.
(7) Sm. L. C. Vol. i. p. 356.

Mr. *Greene*, Q.C., and Mr. *W. Pearson*, for the Defendant:—

First, it must be observed that all agreements for the restraint of trade are *primâ facie* bad: *Mitchel v. Reynolds* (1); and the onus lies on those who support them to shew that they are within the exceptions. The law on this subject is very clearly laid down by Chief Justice *Tindal*, in *Horner* v. *Graves* (2), as follows: "The principles which govern the cases are these: Any agreement restraining a person from exercising a lawful occupation is void; but if it be shewn to be for valuable consideration, and that the restraint is reasonable, that is to say, is no more than necessary for the protection of the contractee, then it is valid." This exposition of the law has been adopted by all the subsequent Judges; by Chief Justice *Denman* in *Hitchcock* v. *Coker* (3); by Chief Justice *Tindal* again, and by the whole Court (4) in the same case; by Lord *Abinger* and Baron *Parke* in *Ward* v. *Byrne* (5); again by Baron *Parke* in *Mallan* v. *May* (6), and by Lord *Langdale* in *Whittaker* v. *Howe* (7); by Vice-Chancellor *Wood* in *Avery* v. *Langford* (8); by Vice-Chancellor *James* in *Leather Cloth Company* v. *Lorsont* (9). Upon these authorities it is perfectly clear that unless this agreement fulfil the conditions which all these learned Judges considered essential, it is bad. Now, then, turn to the agreement: first, as to the time (two years), perhaps that may be free from objection. Then, as to the subject-matter, it appears from the agreement itself that there is *Burton* ale that is not brewed at *Burton*. All articles of commerce, which originally have been produced in some particular place, when they come into general use retain their name. The effect of this stipulation, therefore, might be to prevent the Defendant from selling any beer, and that would be too general, and void. Then look at the nature of the employment which is restrained under these words. The Defendant is restrained from acting as a beer merchant, a beer bottler, a cellarman, a publican, a barman, a waiter. Can this sweeping restraint be necessary for the Plaintiffs' protection? Surely not.

Then turn to the area where the restraint is to operate. There

(1) 1 P. Wms. 181.
(2) 7 Bing. 735, 743.
(3) 6 A. & E. 438, 444–445.
(4) Ibid. 453.
(5) 5 M. & W. 548, 559–561.
(6) 11 Ibid. 653, 665–667.
(7) 3 Beav. 383, 393.
(8) Kay, 663.
(9) Law Rep. 9 Eq. 345.

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is no limit; the wide world, therefore, is the area comprised in the restriction; but how can that be necessary for the Plaintiffs' protection? No lawful employment can be subject to such general restraint: *Ward* v. *Byrne* (1).

Then it is said that this contract may be bad to some extent but good for the rest, but it does not admit of division. It is either bad or good in its entirety. None of the cases relied on to support this agreement have any application. In *Davis* v. *Mason* (2), *Homer* v. *Ashford* (3), *Whittaker* v. *Howe* (4), *Mumford* v. *Gething* (5), *Harms* v. *Parsons* (6), *Leather Cloth Company* v. *Lorsont* (7), the principle was admitted by the Judges, though they considered the particular case did not violate the rule.

On these grounds this agreement must be held void.

Mr. *Dickinson*, in reply:—

It is for the Court to consider what is a reasonable restriction, and that is all the Plaintiffs seek.

SIR JOHN WICKENS, V.C.:—

14 Ch D 355 364

The question in this case is purely legal, viz., as to the validity of the covenant in restraint of trade. There has been a natural inclination of the Courts to bring within reasonable limits the doctrine as to these covenants laid down in the earlier cases, but it has generally been considered in the later as well as in the earlier cases that a covenant not to carry on a lawful trade, unlimited as to space, is on the face of it void. This seems to have been treated as clear law in *Ward* v. *Byrne* and in *Hinde* v. *Gray* (8), and in other cases; and the rule, if not obviously just, is, at any rate, simple and very convenient. No doubt, in the case of the *Leather Cloth Company* v. *Lorsont*, Lord Justice (then Vice-Chancellor) *James* threw some doubt on the existence of a hard and fast rule which makes a covenant in restraint of trade invalid if unlimited in area; but there were expressions in the instrument in that case limiting the generality of the covenant, and it was in substance a case of a different class from this, since the restriction against trading was only a consequence of a clearly

(1) 5 M. & W. 548.
(2) 5 T. R. 118.
(3) 3 Bing. 322, 328.
(4) 3 Beav. 383.
(5) 7 C. B. (N.S.) 305.
(6) 32 Beav. 328.
(7) Law Rep. 9 Eq. 345.
(8) 1 Man. & G. 195; 1 Scott (N.R.) 123.

lawful restriction against divulging a trade secret. In this point of view it may probably be thought to bear some analogy to *Wallis* v. *Day* (1). Assenting, as I do, to everything that was said in *Leather Cloth Company* v. *Lorsont* (2), I can hardly treat it as authorizing me to depart from the recognised rule as to limitation of space in a case so different from it as the present is, and unless that rule be departed from the covenant here is clearly bad.

But the conclusion here would be the same if no such rule existed. Messrs. *Allsopp & Co.*, brewers at *Burton-on-Trent*, engaged a traveller to seek orders for their beer, and bound him by a covenant, which has been so often read that I need not mention the terms of it. Of course the protection that they sought was primarily against the competition of other brewers of real or pretended *Burton* ale, and their first object was to prevent the Defendant from turning against them his connection with, and knowledge of, their customers. This they might reasonably and lawfully have stipulated for. But the covenant goes further than this, and, in fact, beyond anything that can be reasonably required for the Plaintiffs' protection. It seems to me that, according to the view taken in the cases, it could not have been held necessary for the Plaintiffs' protection to prevent the Defendant from soliciting orders for the ale of other *Burton* brewers in places where *Burton* ale had never been sold or heard of, and probably, as Mr. *Pearson* argued, the covenant would, even within the limits where *Allsopp's* company had customers, prevent lawful acts of the Defendant which would not injure the Plaintiffs. I am bound by the authorities to hold the covenant inoperative independently of any absolute rule requiring a limitation of area.

Therefore, without considering the other questions raised on the part of the Defendant, I think the Plaintiffs' case fails, but as the Defendant has, according to my view, deliberately done the express thing he bound himself not to do, and escapes the consequences on technical grounds, I shall dismiss the bill, including the motion, without costs.

Solicitors for the Plaintiff: Messrs. *Braikenridge.*
Solicitors for the Defendant: Messrs. *Burt, Stevens, & Cave.*

(1) 2 M. & W. 273. (2) Law Rep. 9 Eq. 345.

V.-C. W.
1872
Nov. 12.

In re MARSHALL'S SETTLED ESTATES.

Practice—Leases and Sales of Settled Estates Act—Presentation of Petition—Advertisements—Marriage of Female Petitioner.

A spinster, with others, presented a Petition under the *Leases and Sales of Settled Estates Act*, 1856. After the publication of advertisements, but before the hearing of the Petition, she married.

Fresh advertisements, and the examination of the married woman, were dispensed with.

THIS was a Petition presented under the *Leases and Sales of Settled Estates Act* (19 & 20 Vict. c. 120).

When the Petition was presented one of the Petitioners was a spinster, but after advertisements had been inserted in certain newspapers, as required by the 20th section of the Act, and before the hearing of the Petition, she married.

Mr. *F. A. Lewin*, for the Petitioners, after referring to the case of *Re Bunbury* (1), submitted that there was no necessity for any fresh advertisements, and that the Court could dispense with an examination of the married woman.

Mr. *Ince*, for the Respondents.

SIR JOHN WICKENS, V.C.:—

I will dispense with the insertion of fresh advertisements, and I think that the giving of directions in Chambers for the insertion of advertisements was a sufficient judicial proceeding to enable me to dispense with an examination of the married woman under the 37th section of the Act.

Solicitors: Messrs. *Fallowes & Whitehead*, agents for Messrs. *Allcock & Milward, Birmingham;* Mr. *W. Rogers*, agent for Messrs. *Wright & Marshall, Birmingham.*

(1) 11 Jur. (N.S.) 27.

LYLE *v.* ELLWOOD.

[1871 L. 82]

V.-C. W
1872
Nov. 14.

Practice—Affidavit—Foreign Notary—15 & 16 Vict. c. 86, s. 22—Consent of Solicitor for Defendant.

Affidavits made on behalf of the Plaintiff, sworn abroad, before a notary at a place a considerable distance from the residence of any of Her Majesty's consuls, were, on the written consent of the solicitor for the Defendant, allowed to be filed.

IN this cause three affidavits made on behalf of the Plaintiff, and sworn before a notary public, whose notarial seal was affixed, at a place in the *United States of America* about 120 miles distant from the residence of any of Her Majesty's consuls, had been rejected by the Clerk of Records and Writs, on the ground that the provisions of the statute, 15 & 16 Vict. c. 86, s. 22, had not been complied with.

Mr. *Kekewich* asked that a direction might be given to the Clerk of Records and Writs to file the affidavits, notwithstanding the absence of a certificate of a British consul, and non-compliance with the provisions of the Act. He referred to the cases of *Haggitt* v. *Iniff* (1), *In re Earl's Trust* (2), *In re Davis' Trusts* (3), and *Smith* v. *Davis*, before Vice-Chancellor *Malins*, Nov. 13, 1868.

SIR JOHN WICKENS, V.C.:—

On the written consent of the solicitor for the Defendant being given to the Clerk of Records and Writs, the affidavits may be filed.

Solicitors: Messrs. *G. A. Crawley, Arnold, & Green.*

(1) 5 D. M. & G. 910. (2) 4 K. & J. 300.
(3) Law Rep. 8 Eq. 98.

V.-C. W.

1872

Nov. 15.

In re FRENCH'S TRUSTS.

Practice—22 & 23 Vict. c. 35, *s.* 30—*English and Irish Trustees—Jurisdiction —Service of Petition.*

On a Petition (not served on any person) by English and Irish trustees under the 22 & 23 Vict. c. 35, s. 30 (the domicil of the testator and the tenant for life being Irish and English respectively), for the opinion of the Court as to the power of the trustees to make certain investments, the Court, there having been no application to the Court of Chancery in *Ireland*, exercised jurisdiction, and did not require the Petition to be served on any one.

THIS was a Petition by the two trustees under a will, for the opinion of the Court, under the 22 & 23 Vict. c. 35, s. 30, as to their power to make certain investments.

The domicil of the testator and of one of the trustees was Irish, and the domicil of the other trustee and of the tenant for life of the funds was English.

Part of the trust funds proposed to be dealt with were English consols. The Petition had not been served on any person.

Mr. *F. Pollock*, for the Petitioners, referred to *In re Tuck's Trusts* (*a*) before Vice-Chancellor *Malins*, Jan. 22, 1869.

SIR JOHN WICKENS, V.C.:—

No application having been made to the Court of Chancery in *Ireland*, I have no difficulty in exercising jurisdiction, nor in saying that the trustees have power to invest the trust funds on mortgages, or on railway debentures of incorporated companies in *Great Britain* and *Ireland*. It is not necessary to serve this Petition on any one.

Solicitors: Messrs. *Parke & Pollock*.

(*a*) Sc. W.N. (1869) 15.

Ex parte NORTH WESTERN BANK.
In re SLEE.

C. J. B.
1872
Nov. 11.

Bankruptcy Act, 1869—*Bills of Sale Act* (17 & 18 *Vict. c.* 36)—*Factors Act* (5 & 6 *Vict. c.* 39)—*Letter of Hypothecation—Equitable Charge—Bill of Sale—Pledgee—Reputed Ownership—Notice of Act of Bankruptcy.*

A., being a factor and warehouse keeper, by letter of hypothecation pledged to *B.* certain wools to secure a sum of money. No delivery of the warrants for the wools was made, but a promise to deliver them on the following morning was added at the foot of the letter. After being pressed daily to deliver the warrants, *A.* absconded. *B.* thereupon obtained from *A.*'s clerk the keys of the warehouses and possession of the wools. *A.* was a few days afterwards adjudicated bankrupt. The wools belonged to third parties, who had, however, been under advances from the bankrupt, and made no claim :—

Held, that the letter created a good equitable charge; that it did not require registration under the *Bills of Sale Act*; that the goods were not in the order and disposition of the bankrupt; that the transaction was a valid pledge under the *Factors Act*; and that *B.* had a good title against the trustee in bankruptcy.

THIS was an appeal from an order of the County Court Judge at *Liverpool*, dated the 13th of August, 1872, directing the Appellants, the *North Western Bank*, to deliver up to the trustee under the bankruptcy the keys and possession of certain premises or warehouses situate in *Liverpool*, and also certain wools, and to pay to the trustee his costs of and incidental to that application.

It appeared from the evidence that the bankrupt *Slee* was a woolbroker, carrying on business in *Liverpool*, and also a warehouse keeper. He was also a customer of the *North Western Banking Company*, and was in the habit of borrowing money from the bank upon the hypothecation of wools as security for advances.

On the 5th of April, 1872, the bankrupt, being in want of money, obtained from the bank £7000, he giving to them a letter in the following terms:—

"*Liverpool*, April 5, 1872.

"To the *North Western Bank, Limited.*

"In consideration of your advancing to me (against bills to be got hereafter) the sum of £7000, say seven thousand pounds for two months, I agree to hold to the produce hereunder specified, as

C. J. B. 1872 *Ex parte* North Western Bank. *In re* Slee.

trustee for you and as security for the same advance (with interest and commission), and to sell the same under your order, and pay to you the proceeds thereof as due, when received in or towards repayment of the said advance; and I further agree that I will, whenever you request me so to do, deliver the produce to you to enable you to sell the same, and apply the proceeds to the payment of the said advance. The property is fully insured by floating policies with the *Royal*, for the sum of £ , the policy for which I hold for your behalf.

"I am your obedient servant,

"*Edwin Slee.*"

To this letter was attached a schedule of the wools hypothecated, with columns in the schedule for the marks, the description, the classification, and value, and for a statement where the wools then were. The schedule, however, did not state where the wools were, nor was there any warrant attached; but at the foot of the letter there was a memorandum in these words: "Warrants for which I can lodge to-morrow." On the 6th of April (Saturday), Mr. *Archibald*, a bank clerk, applied to the bankrupt for the warrants, but *Slee* made some excuse, saying he would attend to the matter. On Monday, the 8th, and again on the 9th, further applications were made, but the warrants were not forthcoming. On the 10th the bank clerk again applied at *Slee's* warehouse, and was told that he was out of town, but would be back next day, and all would be right. On the 11th nothing was heard from *Slee*, except the receipt at his office of a telegram, dated that day, and addressed from the station at *Derby*, and which was in these words: "Am coming home, £7000 for the bank." This telegram was taken to the bank on the day it was received, and shewn to the managers. *Slee* had, in fact, absconded, and nothing further has been heard of him up to this time, and it is supposed that he sent the above telegram to lull suspicion and gain more time to get away in safety. On the 12th *Slee's* brother, who had acted as his clerk, was sent for by the bank, and interrogated as to the bankrupt, and where he had gone. The reply given by the brother was, that he was in ignorance of the whole matter. On Saturday, the 13th, *Slee's* brother was again sent for, and had an interview with Mr. *Arnold*, one of the bank directors, who demanded the keys of the warehouses in

which the hypothecated wool then was. As to the exact terms used in making the above demand, the evidence was somewhat conflicting; but there seems no doubt that the police-office was mentioned, and mentioned in connection with a refusal to deliver up the keys. In the course of the day the bank clerk, *Archibald*, obtained the keys, and the bank took possession of the warehouses in which the wools then were, and of the wools themselves. It however being considered possible, as it was known had been the case before, that *Slee* might return, the bank allowed the business to be carried on a few days longer; but on his not returning on the 19th of April a petition was filed, and on the 23rd he was adjudicated bankrupt; the act of bankruptcy being, that he, being a trader, had departed from his place of business with intent to defeat and delay his creditors. The wools were not the property of the bankrupt, but had belonged to third parties, who, however, being under advances from the bankrupt, made no claim. The trustee under the bankruptcy claimed to have the keys and wool given up to him, which the bank offered to do on his undertaking that the wool should not be dealt with until their respective rights were ascertained. This the trustee refused to do, and on the case coming before the County Court Judge, he made the order now appealed from.

Mr. *Benjamin*, Q.C., and Mr. *McConnell*, for the Appellants, the *North Western Bank*:—

The dealings constitute an equitable charge in favour of the bank, and entitle them to be paid out of the proceeds of the wool. The charge was made in the ordinary course of business, though the goods in question were not out and out the property of the bankrupt, and the title of the bank had not been perfected by delivery of the warrants; the cause was the fraud of the bankrupt, not the fault of the bank, and so the title of the bank under the *Factors Act* (5 & 6 Vict. c. 39) is good. The letter of hypothecation does not come under the *Bills of Sale Act* (17 & 18 Vict., c. 36), as the letter of hypothecation gives us no power to seize the wool, only a promise to grant possession; and by the 7th section such a letter is expressly excluded from the operation of the Act. Neither is our title bad under the reputed ownership clauses of the

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Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), as though we never got the warrants delivered, yet we demanded possession of them from day to day, and were ultimately only defeated by the fraud of the bankrupt. Finally, there is no question but that the creditors have got the £7000 advanced by the bank, which, from the evidence of the books of the bankrupt, was paid away in the ordinary course of business, and, in the words of Chief Justice *Erle*, in the case of *Langton* v. *Waring* (1) (an entirely analogous case to this), they claim to keep both the money and the goods. We submit that is not right, but that the bank is entitled to be paid the £7000 out of the proceeds of the sale of the wool.

Mr. *Gully*, for the trustee:—

The letter of hypothecation was clearly a declaration of trust, without transfer, within the meaning of the 7th clause of the *Bills of Sale Act*, and the words at the end of that clause limiting the application of the Act are intended to apply to cases of ordinary transactions between merchants and business people, and are not intended to defeat declarations of trust without transfer, which are clearly bills of sale. Further, when the bank took possession of the goods, the bankrupt was absenting himself from his business, and they ought to have drawn the reasonable inference from the facts in their possession, which amounted to constructive notice of an act of bankruptcy: *Yate Lee* on Bankruptcy (2); and so could not perfect their inchoate title after such knowledge of the facts.

Sir James Bacon, C.J.:—

I think the case clearly one not only covered by authority, and a great deal more than covered, but that it is plain on the facts of the case itself. The learned Judge of the County Court seems to have thought that the *Factors Act* (5 & 6 Vict. c. 39) created a difficulty in the way of the bank, for that it was doubtful whether the bankrupt had a right to hypothecate, or pledge, or deal with these goods in the manner he did. Upon the facts submitted, I cannot doubt that he had, under the Act, full power to do so. That, therefore, I think disposes of that question. To the argument that it came within the *Bills of Sale*

(1) 18 C. B. (N.S.) 315. (2) Page 242.

Act (17 & 18 Vict. c. 36), I am quite unable to accede, because I do not think the *Bills of Sale Act* applies to the case at all. There is in the 7th clause a plain and careful exposition of what may be called the mercantile transaction of advance and pledge, but even if that were not so, the *Bills of Sale Act* relates to totally different transactions, creates different rights, imposes different duties, and it would be a perversion of the words, as it would be a total departure from the meaning, to say that such a transaction of advance and hypothecation amounted to a bill of sale, or that it had any analogy or relation to any such transaction. The learned Judge seems to me to have taken that view of the case, because in a part of his judgment I find him saying this: "If the goods now in question had belonged to the bankrupt at the time of their hypothecation" (as for all purposes of hypothecation they no doubt did belong to him), "I should agree with Mr. *Benjamin* that the hypothecation might operate as an equitable charge, and that in that event the mode in which the bank actually obtained possession of the goods, the property in which had already passed to them by virtue of the letters of hypothecation, might not affect their equitable right to hold them as against the trustee as security for their loan." Now that, in my opinion, described the case with very perfect accuracy. The goods were, for the purpose of the transaction between the bankers and the bankrupt, his goods, and they were lawfully and honestly dealt with for the purpose of the advance. The mode in which the advance was made was in the ordinary course of trade, the engagements entered into by the bankrupt were complete, and the goods from that time were charged with the loan of, and became the property of, the bankers. I think, therefore, that neither under the *Bills of Sale Act*, nor under the *Factors Act*, can there be any valid objection made to the title of the bankers to take proceedings for them.

Then it is said that they were in the order and disposition of the bankrupt. But then there is another element to be considered, namely, whether they were so "with the consent of the true owner." If the bankers were the true owners of these goods until their advance was paid, what shadow of pretence is there for saying that there was any consent of the true owner? On the contrary, urgent demands were made by the bankers to have the terms of

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the hypothecation completed, and nothing can be further from the fact, as appears by the case agreed on upon both sides, than saying that there was anything like consent on the part of the true owner. Then an attempt was made by Mr. *Gully* in his argument to say that they had notice of the act of bankruptcy committed before they took possession. I do not think there is anything on which I can rely as leading to the inference of any such notice. When the bankrupt went away, and he had gone away before, his absence was not long, and the bankers were pacified by a telegram, the effect of which was, "I am coming home, and I have £7000 I am going to bring to pay you." They may have suspected that the bankrupt was dealing with their interests and his own in a very rash and reckless way by going away from *Liverpool* and spending his time at *Derby;* but that is far from giving to them notice that he had committed an act of bankruptcy by absconding with intent to defeat and delay his creditors. I think the case is reasonably clear, and that the bankers are entitled, under the letters of hypothecation, to that which they have claimed.

With respect to the keys, I cannot take notice of the facts stated. I understand it is not disputed that, on the hearing before the learned Judge, the bankers were prepared to give the trustees the keys upon the simple condition that they would not deal with the contents of the warehouse, so far as they were claimed by the bankers, until the rights claimed on each side had been judicially determined. That seems to me to be a very reasonable condition to impose. However, the trustees did not think fit to accede to that. I think the order must of necessity be discharged. I think the claim of the trustee was unfounded, and I think he should pay the costs in the Court below.

Solicitors: Messrs. *Chester, Urquhart, Bushby, & Mayhew,* for Messrs. *Laces, Banner, & Co., Liverpool;* Mr. *T. Bellringer.*

In re CHAPMAN.

C. J. B. 1872 Nov. 18.

Bankruptcy Act, 1869, *s.* 72—*Bankruptcy Rules*, 1870, *r.* 260—*Foreign Creditors —Actions in Foreign Courts—Jurisdiction—Injunction—Appointment of Receiver—Leave to appear and defend Actions.*

A., a trader in *London*, being in difficulties, sent round a letter to his creditors, asking for indulgence; thereupon certain creditors in *New York* commenced actions in the *New York* Courts in respect of bills accepted, made payable, and dishonoured in *London* to attach the debts due to *A.* from various *New York* firms. *A.* immediately filed a Petition for liquidation, a receiver was appointed, and application made for an injunction to restrain the actions in the *New York* Courts:—

Held, that the Court would not grant an injunction against the foreign creditors suing abroad.

THIS case came on upon motion, and was an application for an injunction to restrain certain proceedings which had been commenced in the Supreme Court of *New York* under the following circumstances:—Mr. *N. A. Chapman* had for some time carried on an extensive business in the city of *London*, under the style of *John Fox & Co.* Owing to heavy failures in *New York* he found himself, in the month of September, 1872, in such a position that it became necessary to make some statement to his creditors. Accordingly a letter was written and sent round by his solicitors to all his creditors, asking for indulgence until it could be ascertained accurately in what state his affairs then were. His books were immediately placed in the hands of Messrs. *Cuysdill, Saffery, & Co.*, and an approximate statement was prepared, by which it appeared that the liabilities of the firm were about £116,000. These liabilities were principally in respect of bills accepted by Messrs. *Fox & Co.* on account of houses in the *United States.* A power of attorney was at once sent out to *America* to protect the interests of Messrs. *Fox & Co.* Several of the acceptances upon which Messrs. *Fox & Co.* were at that time liable had since been returned by the parties on whose account they were given, and the liabilities were thereby reduced to about £90,000. No further proceedings were taken by the creditors in *England.* The mail from *America*, which arrived in *England* on the 13th of November, brought Messrs. *Fox & Co.* notices that

M. R.
1872
Dec. 7.

In re LOWRY'S WILL.

Railway Company—Compulsory Powers—Agreement to sell—Infant Devisee—Constructive Trustee—Trustee Act, 1850.

Where the owner of lands agrees to sell to a railway company land which they have power to take for the purposes of their undertaking, and afterwards dies, having devised his real estate to an infant, the infant devisee is a trustee within the meaning of the *Trustee Act*, 1850, and a vesting order may be made on a Petition under that Act.

BY two agreements in writing, dated respectively the 9th of June, 1870, and the 20th of October, 1871, *Mary Ann Lowry* agreed to sell to the *Midland Railway Company* certain parcels of land to which she was entitled in fee, and which the company had power to take for the purposes of their undertaking. On the 17th of January, 1872, before the title had been accepted, *Mary Ann Lowry* died, having devised all her real estate to an infant, and her executors now presented a Petition under the *Trustee Act*, 1850, praying that the infant devisee might be declared a trustee within the meaning of the Act of the lands comprised in the agreements with the railway company, and that on payment by the company of the purchase-money to the Petitioners, the devisee might be ordered, or some proper person might be appointed, to execute a conveyance to the company, or as they should direct; and that the company might pay the costs of the application.

Mr. *Fry*, Q.C., and Mr. *Villiers*, for the Petitioners:—

The executors are clearly entitled to the purchase-money: *In re Manchester and Southport Railway Company* (1). The order asked may be made on Petition: *Re Russell's Estate* (2).

Mr. *T. D. Mitchell*, for the infant devisee, supported the Petition.

Mr. *Sargant*, for the railway company, submitted that the order could not be made until a decree had been made declaring the

(1) 19 Beav. 365.

(2) 12 Jur. (N.S.) 224.

infant to be a trustee of the property: *In re Carpenter* (1); *In re Faulder*, before the Master of the Rolls on the 24th of February, 1866.

M. R. 1872 *In re* LOWRY'S WILL.

LORD ROMILLY, M.R., considered that the order might be made.

Solicitors: Messrs. *Sharp & Ullithorne;* Messrs. *Beale, Marigold, & Beale.*

CARY *v.* HILLS.

M. R. 1872 Dec. 11.

[1872 C. 233.]

Administration—Plea that Defendant is not Executor.

To a bill alleging that the Defendant is executor of a testator, and had, before probate, possessed himself of part of the personal estate, and praying for general administration, a plea that the Defendant is not executor is a complete answer.

Rayner v. *Koehler* (2) not followed.

PLEA.

The bill stated to the effect that *Margaret Heard Lester*, deceased, duly made and executed her last will, dated the 9th of December, 1869, whereby, after bequeathing certain specific legacies, she gave, devised, and bequeathed unto her executors thereinafter named all her real and personal estate upon certain trusts; and she appointed the Defendant, *Octavius Lilburne Hills*, and one *James Alfred Hallett*, executors; that the testatrix afterwards duly made and executed a codicil to the said will, dated the 6th of January, 1871, whereby, amongst other gifts, she bequeathed an annuity of £120 to the Plaintiff, and made certain specific bequests in his favour; that the testatrix also made and duly executed a further codicil to her said will, dated the 29th of June, 1871, whereby, amongst other things, she bequeathed to the Plaintiff a pecuniary legacy; that the testatrix died on the 9th of June, 1872; that *James Alfred Hallett* declined to accept

(1) Kay, 418. (2) Law Rep. 14 Eq. 262.

M. R.
1872
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M. R. 1872 *In re* Lowry's Will.

Lord Romilly, M.R., considered that the order might be made.

Solicitors: Messrs. *Sharp & Ullithorne;* Messrs. *Beale, Marigold, & Beale.*

CARY *v.* HILLS.

M. R. 1872 Dec. 11.

[1872 C. 233.]

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Rayner v. *Koehler* (2) not followed.

16 Beav. 554
540, 548
17 Eq. 79
36 L.J. Ch. 260

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(1) Kay, 418. (2) Law Rep. 14 Eq. 262.

See also Rowe v. Harris, 2 H 2 16 Beav. 17 Eq. 20 Jur. N.S. 3

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the trusts or to act as executor of the said will, and had by deed poll disclaimed the trusts thereof; that the said will and two codicils were duly proved by the Defendant alone in the principal Registry of Her Majesty's Court of Probate; that the testatrix was at the date of her decease entitled to certain personal estate therein specified, and that the personal estate of the testatrix was sworn under the sum or value of £4000; that the testatrix was not at the time of her death seised of or entitled to any real estate; and that the debts of the testatrix amounted to the sum of £200 or thereabouts. The bill then alleged (paragraph 8) as follows:—

"The Defendant, *Octavius Lilburne Hills*, shortly after the decease of the said testatrix, and before the grant of probate to him, took upon himself the duties of his said office of executor, and possessed himself of, and collected and got in or sold, a considerable portion of her said personal estate, and, amongst other items, her household furniture and other effects; and out of the proceeds of such sales he paid divers debts of the said testatrix, and also her funeral expenses, amounting in the aggregate to £150, or thereabouts. The said Defendant has furnished to the Plaintiff no account of his said receipts and payments."

The bill then stated to the effect that the personal estate was likely to prove insufficient for payment in full of the legacies and annuities given by the will and codicils, and that questions were likely to arise with reference to the true construction of the will and codicils; and it prayed that the personal and (if any) the real estate of the testatrix might be administered under the direction of the Court; and that all proper and necessary accounts might be taken, inquiries made, and directions given; and for further relief.

The Defendant put in a plea, which, after averring that caveats had been entered in the Probate Court to prevent any person from proving the will or testamentary writings of the testatrix, proceeded as follows:—"The aforesaid steps and proceedings in the said Court of Probate have prevented probate being obtained of the said will and testamentary writings of the said testatrix, or any of them, or the constitution of a legal personal representative of the said testatrix; and in consequence of the aforesaid steps and proceedings in the said Court of Probate, and in fact, I have

not proved the said will or the codicils or testamentary writings in the said bill of complaint set forth, or other the testamentary writings of the said testatrix, or any of them, in the principal Registry of Her Majesty's Court of Probate, or elsewhere, or sworn the personal estate of the said testatrix under the sum or value of £4000, or under any other sum or value, or been constituted in any manner the legal personal representative of the said testatrix, and I am not, nor have I ever been, the duly constituted executor or legal personal representative of the said testatrix."

The plea now came on for argument.

Mr. *Southgate*, Q.C., and Mr. *Fellows*, for the plea:—

The plea is a complete answer to the bill: *Hill* v. *Neale* (1); *Cooke* v. *Gittings*. (2) If the parts of the bill covered by the plea are struck out, the only allegation on which any relief could be granted would be that contained in paragraph 8; but the relief to which the Plaintiff would be entitled upon that allegation would be, not general administration, but the appointment of a receiver *pendente lite*. In *Tempest* v. *Lord Camoys* (3) the bill was saved because it contained an allegation that the testator was entitled to real estate; but here the bill alleges that the testatrix was not entitled to any. In *Overington* v. *Ward* (4) it was held that a bill praying for a receiver *pendente lite* and for general administration was bad; and *De Feucheres* v. *Dawes* (5) is a decision to the like effect. Some of the observations in *Rayner* v. *Koehler* (6) are adverse to our contention, but the decision is not, for the bill alleged that the testator was entitled to real estate. An averment that the Defendant had not possessed himself of the estate as alleged in the bill would make the plea bad for duplicity. The decision in *Motion* v. *Moojen* (7) shews that the Defendant has taken a proper course in filing this plea.

Sir *R. Baggallay*, Q.C., and Mr. *Russell Roberts*, for the Plaintiff:—

It is not enough to say that if the parts of the bill covered by

(1) 5 L. J. (O. S.) Ch. 144.
(2) 21 Beav. 497.
(3) 35 Ibid. 201.
(4) 34 Beav. 175.
(5) 5 Ibid. 110.
(6) Law Rep. 14 Eq. 262.
(7) Law Rep. 14 Eq. 202.

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the plea were struck out the bill would be demurrable; and that is what the argument on the other side amounts to. The *ratio decidendi* in *Rayner* v. *Koehler* (1) governs this case. The decision in *Cooke* v. *Gittings* (2) may be accounted for on the ground that the bill in that case did not aver that the Defendant took possession of the personal estate before probate.

LORD ROMILLY, M.R.:—

16 Eq 540
3 Ch D 200

This plea must be allowed. You cannot administer the personal estate of a testator in Chancery unless you have his legal personal representative before the Court; if you were able to do so you would work great injustice. If at the hearing of an administration suit the Court finds that it has not the legal personal representative of the testator before it, then its arm is paralyzed, and it can do nothing. This plea in substance says that there is no legal personal representative of the testatrix, and indeed it is not alleged, or even suggested, that any person other than the Defendant has been constituted her legal personal representative. It is true that the bill alleges that the Defendant has possessed himself of some part of the personal estate; but if he had possessed himself of every penny, that would not entitle the Plaintiff to the relief he asks. If a person has taken possession of the estate, you may file a bill for a receiver to take care of the property until a legal personal representative is appointed, and the Court will appoint a receiver for that purpose; but that is a totally different thing from making a decree for general administration. I must therefore allow this plea.

Sir *R. Baggallay* asked for leave to amend.

LORD ROMILLY, M.R.:—No; the plea goes to the whole bill.

Solicitors: Messrs. *Ravenscroft & Hills;* Messrs. *Rooks, Kenrick, & Harston.*

(1) Law Rep. 14 Eq. 262. (2) 21 Beav. 497.

WARD *v.* RAW.

V.-C. M.
1872
Nov. 20.

Appeal — County Court — Limit of Time — Waiver — Consent to Signature of Case.

Parties to an appeal from a County Court may waive the limit of thirty days from the determination or direction intended to be appealed from, prescribed by sect. 18 of the *County Courts Equitable Jurisdiction Act*, 1865, and their consent to the signature of the case for appeal by the County Court Judge is sufficient evidence of such waiver.

THIS was an appeal from the decision of the County Court Judge at *Ripon*.

Two orders of the Court were appealed from, dated respectively the 27th of April and the 6th of July, 1872. They were made in a plaint in equity filed in the County Court on the 12th of December, 1871. By the order of the 27th of April, 1872, the Appellant had been declared liable to pay a sum of money, with interest from a certain date, and certain consequential directions were also made, in pursuance of which the Registrar made a certificate. The order of the 6th of July was in the nature of an order on further consideration of the suit.

The Defendant against whom the orders were made had intended to appeal at once against the first order, but, under some misapprehension as to his proper course, neglected to give the notice to the other party to the plaint, or his attorney, within thirty days after the date of the order, as required by section 18 of the *County Courts Equitable Jurisdiction Act*, 1865 (28 & 29 Vict. c. 99).

Due notice of appeal from the second order was given, and the parties appeared in the usual way before the Judge to settle the appeal case. The Defendant to the plaint at first objected to the validity of the first order being questioned, but he ultimately assented to the case being signed by the Judge, and it was signed accordingly.

The case, as signed, set out the facts in issue in the plaint, and asked the opinion of the Court of Appeal, first, whether the declaration in the first order was right in law; and secondly,

"Whether the said decree or decretal order of the 27th day of

V.-C. M. 1872 WARD v. RAW.

April, 1872, and the said final order of the said 6th day of July, 1872, or either and which of them, are or is erroneous, and ought to be reversed."

Then followed a note, appended both at the wish of the Defendant and at the instance of the Judge, who desired to have the question as to the right of appeal after the expiration of the thirty days settled for his own satisfaction. The note was as follows:—

"As the parties consent, I have signed this case; but as a guide to the County Court Judges in future, I humbly request the Judge of the Appeal Court to decide whether, under sect. 18 of 28 & 29 Vict. c. 99, any appeal can be heard as to the order of the 27th day of April, 1872."

The signature of the Judge followed this note.

The matter being called upon, counsel for the Respondent raised the question of the right to appeal against the first order as a preliminary objection.

Mr. Chitty, for the Respondent:—

The Respondent by consenting to the signature of the case by the Judge, with the note appended, intended to leave it open to him to raise the question of the right to appeal after the expiration of the thirty days. Under the Act, the right of appeal is absolutely gone at the end of the thirty days, and parties have not the power to waive the time, even if they desire to do so. But even if parties can waive the objection, there is nothing here which can be said to amount to a waiver, the question being left entirely open by the Judge's note. The time for appealing runs from the date of the order: *In re Dudley and West Bromwich Banking Company* (1); and the Plaintiff must have been aware within the thirty days of the necessity for giving notice.

Mr. *Pearson*, Q.C., and Mr. *Villiers*, for the Appellant, were not called upon.

SIR R. MALINS, V.C.:—

This is a preliminary objection to the hearing of this appeal, on the ground that there is no right of appeal after the expiration of

(1) 32 L. J. (Bkcy.) 68. 9 Jur N.S. 702. 32 L J S. 457

thirty days from the date of the order desired to be appealed from. By the 18th section of the *County Courts Equitable Jurisdiction Act* it is perfectly clear that an order becomes final at the end of thirty days after its date. Therefore, if no notice of appeal is given within that time, a decree or order is conclusive.

In the present case thirty days elapsed from the date of the order before any notice of appeal was given. The parties afterwards attended before the Judge to settle the case for appeal, and if the Respondent had then taken the objection as to time, it must have been allowed. The parties, however, consented to have the case signed by the Judge, and, having done so, I think it is too late for the Respondent to take the objection.

Nothing is more clear to my mind than that the parties, by consenting to have the case settled and signed, have waived the objection as to time. The preliminary objection is therefore overruled, and the case must be heard on its merits.

Solicitors: Messrs. *Sharp & Ullithorne;* Messrs. *Shum & Crossman.*

V.-C. W.

1872

Nov. 19, 20; *Dec.* 4.

PRYSE v. PRYSE.

[1872 P. 77.]

Special Case Act, 13 & 14 *Vict. c.* 35—*Jurisdiction*—*Fictitious Statements in Case.*

4 Ch D 193.

On a special case raising questions of legal limitations at the instance of a Plaintiff not in possession, the Court declined to make any order or to entertain any fictitious question as to title deeds or accounts in order to found jurisdiction.

Key v. *Key* (1) observed on. *Forsbrook* v. *Forsbrook* (2) distinguished.

SPECIAL CASE.

Daniel Bowen, by his will, dated the 3rd of September, 1846, devised certain estates in the county of *Cardigan* as follows: "To the use of my sister *Anne W. Philipps* and her assigns during her life, and from and after her decease to the use of all or any one or more exclusively of the other or others of the children of the said *A. W. Philipps* now living or hereafter to be born, in such parts or for such estate as the said *A. W. Philipps* by any deed, with or without power of revocation, or by her will or any codicil thereto, whether sole or married, and notwithstanding her present or any future coverture, appoint, and in default of and in the meanwhile and until such appointment, and subject thereto and to the estates to be appointed, to the use of the respective daughters of *A. W. Philipps* in equal shares for their respective lives, and as to the share of each daughter of *A. W. Philipps*, on the decease of each such daughter to the use of the respective first and other son and sons of her body successively one after another in order of priority of birth, and the heirs of his and their respective body and bodies; and in default of such issue, to the use of the respective daughters and daughter of each such niece, and the heirs of the body and respective bodies of such respective daughters and daughter, in equal shares as tenants in common in tail general, with cross remainders between them in tail general, and if all such daughters of each such niece but one shall die without issue, or there shall be but one such daughter, to the use of such surviving, remaining, or only daughter, in tail general; and in default of such issue, to the use of the others and other of my said niece's

(1) 4 D. M. & G. 73. (2) Law Rep. 3 Ch. 93.

17 June 76

daughters and daughter of *A. W. Philipps* respectively, in equal shares if more than one, and if but one, to such one for the same estates and with the same subsequent limitations to their respective sons and daughters, and including this cross limitation, as are herein expressed concerning their original shares."

As to the same hereditaments, on failure of all the limitations thereinbefore expressed, the testator, by his will, declared that they should remain and be for the use of the second and other sons (except her eldest son) of *Jane Lloyd* successively for life, with divers remainders over.

Daniel Bowen died in 1847, and his will was duly proved by his executors on the 31st of December of the same year. Soon after his death his sister, *A. W. Philipps*, entered into possession of the devised estates, and continued in possession till her death in February, 1848. *A. W. Philipps* had only one son, who died an infant, and three daughters only—*Bridget Jane*, who in 1853 married *C. A. Harries*; *M. A. Philipps*, who in 1844 married *J. P. V. Pryse*; and *E. F. L. Philipps*, who in 1831 married *F. L. Philipps*.

Neither *Bridget Harries* nor *E. F. L. Philipps* had any children.

A. W. Philipps never executed any deed by way of exercising the power contained in *Daniel Bowen's* will, but by her will dated the 24th of November, 1847, she made the following disposition: "I, *A. W. Philipps*, now the wife of *John W. Philipps*, of *N.*, being of sound mind, do make my last will and testament in manner following, that is to say, In pursuance and exercise of the power of appointment and authority given me under and by virtue of the last will and testament of my late brother *Daniel Bowen*, do hereby, by this my will, give and devise the house and garden in *Newcastle Emlyn, Carmarthen*, to my daughter *E. F. L. Philipps*, her heirs and assigns for ever. Also I give and devise *Bwlchlrychan*, in the parish of *Llanwenog*, to my second daughter, *Mary Ann Pryse*, the wife of *J. P. Pryse*, for and during the term of her natural life, and from and after her decease I give such portion thereof as shall be selected by the said *J. P. Pryse*, either before or immediately after the decease of the said *Mary Ann Pryse*, of the value of £200 per annum, for and during the term of his natural life; and from and after his decease I give the same to the person entitled to the other part of the said estate; and as to the said portion of my said freehold property as is situated in

V.-C. W. 1872 PRYSE v. PRYSE.

the parish of *Llanwenog*, my will is, and I hereby devise the same, together with what shall be selected by my son-in-law *J. P. Pryse*, for life unto the heirs of the body of my said daughter *Mary Ann* lawfully begotten as she shall by her last will or deed appoint notwithstanding her coverture; and in default of such appointment I give the same to the first and other son or sons of my daughter *Mary Ann*, his and their heirs, and for want of issue male of her body, I give and devise the same to the daughters or daughter of my said daughter *Mary Ann* as tenants in common, and for want of such daughter, then I give all my said estate in the said parish to my surviving daughters, *Bridget Jane* and *Elizabeth Frances*, as tenants in common, and the heirs of their respective bodies; and for want of issue of either of my said (three) daughters, *Bridget Jane*, *Mary Ann*, or *Elizabeth Frances*, I give the same to be disposed of by the survivor of my said three daughters, and for want of the survivor of them making such disposition, I give my said estate to my own right heirs for ever.

A. W. Philipps died in February, 1848, without making any other disposition. Upon her death her daughter *Mary Ann Pryse* and her husband entered into possession and into the receipt of the rents and profits of the said hereditaments. *Mary Ann Pryse* died in June, 1851, having had only one child, the Plaintiff, *Mary Ann Emily Jane Pryse*, who at the time of her death was about two years of age. *Mary Ann Pryse* made no appointment, and left her husband her surviving, who immediately entered into possession of the estate, and claimed and now claims to hold it as tenant by the curtesy if his wife were tenant in tail, and if not he claimed and claims a portion of it to the value of £200 a year during his life. On the 7th of May, 1870, the daughter of *Mary Ann Pryse* attained the age of twenty-one, and was desirous of barring the estate tail created or supposed to have been created by the will of *A. W. Philipps*. Questions having arisen as to the rights of the parties, this case was submitted for the opinion of the Court:—

1. First, whether under the wills of *Daniel Bowen* and *A. W. Philipps*, *Mary Ann Pryse* was tenant in tail or tenant for life in the said estates.

2. Whether, if *Mary Ann Pryse* was only tenant for life, the gift of a portion of the estate and the value of £200 per annum to the husband of *Mary Ann Pryse* was valid.

3. Whether, if under the will of *A. W. Philipps* an estate for life only was devised to *Mary Ann Pryse*, the ulterior appointments were wholly or partially, and if partially to what extent, well appointed, or whether they were, or any and which, null and void.

4. Whether, if an estate for life only was by the will of the said *A. W. Philipps* devised or appointed, the Plaintiff, on her mother's death, became, under the will of *A. W. Philipps*, entitled to an estate in inheritance in fee simple in the said estate, or for an estate tail, or whether she became entitled to an estate tail in one undivided third part of the said estate under the will of *Daniel Bowen*, each of the sisters of *Mary Ann Pryse*, viz., *Bridget J. Harries* and *E. F. L. Philipps*, being entitled to one other third part thereof, with remainder to the use of their first and other sons successively in tail male, and in default of such issue remainder to the daughters.

On the case being opened,

The VICE-CHANCELLOR said:—These are all legal questions, and I must require you to satisfy me that they are within the jurisdiction of this Court.

Mr. *Lindley*, Q.C., and Mr. *Macnaghten*, for the Plaintiff:—

In *Key* v. *Key* (1) the Court decided similar questions without objection; but even if the Court felt a difficulty on the point of jurisdiction, it could direct an amendment, as was done in *Forsbrook* v. *Forsbrook* (2). so as to bring the case within the Act. In that case the equitable question suggested was whether the first takers had power to commit waste. Here a question as to the custody of the title deeds, or of the Plaintiff's right to an account, might naturally arise from the relation of the parties.

Mr. *Dickinson*, Q.C., Mr. *E. G. White*, and Mr. *G. W. Collins*, appeared for Mr. and Mrs. *Philipps*. They said that all the parties desired the opinion of the Court to be taken. In *Key* v. *Key* the question of jurisdiction was raised and got over (but how, he (Mr. *Dickinson*) did not remember), and therefore was not referred to in the report. The report shewed that the Court must have had the facts before them, and could not have decided in ignorance that a question of jurisdiction was involved in the case. They cited *De Windt* v. *De Windt* (3).

(1) 4 D. M. & G. 73. (2) Law Rep. 3 Ch. 93. (3) Law Rep. 1 H. L. 87.

17 Jan 769

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Mr. *Joshua Williams*, Q.C., and Mr. *C. Hall*, for other parties, said, that in addition to the question of title deeds and accounts, there was a further one, whether the Plaintiff was not bound to execute a settlement.

The VICE-CHANCELLOR:—I feel great difficulty on the subject of jurisdiction; but the case may be argued.

The case was then argued at considerable length, when His Honour reserved his judgment.

Dec. 4. SIR JOHN WICKENS, V.C.:—

The Plaintiff in this case, a lady who has recently attained her majority, asks the Court to decide that she is legal tenant in tail of certain estates in *Cardiganshire* in remainder expectant on the determination of a legal interest in her father as tenant by the curtesy, or, in the alternative, that she is legal tenant in fee simple or fee tail in possession of those estates, or lastly, that she is legal tenant in fee of and in possession of one undivided third part of them. The Plaintiff's father has been in undisturbed possession of the property since her mother's death, in June, 1851. According to the ordinary rule this Court will not decide a legal question as to a right to real estate in remainder, and will not try the legal title to real estate in possession of a person who is out of possession. Both propositions are elementary. As regards the former, *De Windt* v. *De Windt* was referred to during the argument as giving the highest sanction to what was said in *Greenwood* v. *Sutherland* (1), and *Garlick* v. *Lawson* (2). But in fact no authority is required for either. It is said that the Court is asked to do no more here than was done in *Key* v. *Key* (3), and by means of an artifice suggested by the Court in *Forsbrook* v. *Forsbrook* (4). If *Key* v. *Key* be law, the amendment in *Forsbrook* v. *Forsbrook* seems to have been unnecessary, so that the cases are not quite consistent. And notwithstanding my unfeigned respect for the Judges who decided *Key* v. *Key*, and notwithstanding the fact which, though not appearing in the report, was stated to me by Mr. *Dickinson*, that the point was considered, I must decline to follow it, as

(1) 10 Hare, App. xii.
(2) Ibid. xiv.
(3) 4 D. M. & G. 73.
(4) Law Rep. 3 Ch. 93.

regards the question of jurisdiction, in any case not similar, which this is not. In *Forsbrook* v. *Forsbrook* (1) it was held that a person in possession under a legal title (so far as appears) might obtain the opinion of the Court on a special case, whether he could commit waste or not, which in that case involved the question whether he was tenant for life or in tail. This determined, contrary to the common opinion (and I believe to the intention with which the *Special Case Act* was framed), that the Court can decide on a special case a question which could not be determined in a suit by the Plaintiff against the Defendant named in the heading, and also decided that waste is a matter cognisable by Courts of Equity within the meaning of the *Special Case Act.*

No doubt Courts of Equity, for the purpose of administering assets, and generally in taking accounts, try many different sorts of action, and for the purpose of granting or refusing injunctions try numerous cases of trespass and the like, as they may incidentally, and for the purpose of exercising their proper jurisdiction, try questions of Ecclesiastical or Scotch or Italian law; but the *Special Case Act* cannot have been meant to extend to these. No doubt by "questions cognisable in Courts of Equity" it meant primarily, if not exclusively, equitable questions. At the same time waste, if not an equitable question, is one which often arises in Courts of Equity, and what the Court did in *Forsbrook* v *Forsbrook* was so convenient and just that its authority will, no doubt, be recognised in any case at all similar, at least by any tribunal except the highest. It is as yet, I believe, a single case, unless *Key* v. *Key* (2) be considered as involving the same principle. It has been already suggested that the two cases are not altogether consistent. Where a new jurisdiction is given by statute the Court cannot go beyond it on grounds of convenience. And whereas, as in the statute now in question, the obvious intention is merely to simplify, for certain purposes, the power of a Court of recognised jurisdiction, it can hardly be right for that Court to twist the Act into an instrument for claiming a more extended jurisdiction or diverting to itself the jurisdiction properly belonging to another. Still the authorities seem to shew that within certain limits the Court may be ingenious in seeking grounds to give itself jurisdiction under this particular Act, where the principal question is

(1) Law Rep. 3 Ch. 93.

(2) 4 D. M. & G. 73.

V.-C. W. 1872 PRYSE v. PRYSE.

one which it cannot directly deal with; and I was asked to apply some similar process for the purpose of acquiring jurisdiction by a sidewind over questions which I have no right to decide directly. First, it was faintly suggested that the Plaintiff may be entitled to an account against her father as *quasi* bailiff during her minority. But her principal contention is, that his possession was rightful. And on the alternative contention, which she in effect repudiates, her title is a title to eject, and nothing else, though she would be entitled to an account if she had established her title in ejectment. It was further suggested that she has an interest in the title deeds. No doubt any remainderman having a vested interest has certain rights to the title deeds which may be asserted by bill: *Davis* v. *Earl of Dysart* (1); but such a bill raises a question between tenant for life and the remainderman only, and even if it were maintainable where the remainderman's title is open to doubt, it cannot be used to determine questions between adverse remaindermen. Still less could a bill founded on an alleged title to deeds be made to serve the purposes of an ejectment, which is the Plaintiff's alternative title. It should be added that in this case there is not a word to shew whether there are deeds or who has them. If the Court, for the purpose of asserting jurisdiction, suggested facts to be stated or questions to be asked, there would be some danger of its having fictitious cases brought before it; and to this there would be a very strong objection on many grounds. I have no reason to believe that there was any real question as to the deeds in this case, and in fact am convinced that there is none.

On the whole, I can see no ground for assuming the jurisdiction to answer the questions raised by this case; and though I have heard them fully argued, and have formed a strong opinion upon them, I shall do as the Lord Justice *Turner* did in *Bulkely* v. *Hope* (2), and abstain from expressing it. Probably the best way will be to say, as was done there, "This Court does not think fit to make any order in this case."

Solicitors: Messrs. *Lempriere, Turner, & Clayton,* agents for Mr. *Walter Owen Price, Carmarthen.*

(1) 20 Beav. 405. (2) 8 D. M. & G. 36.

743.

LONDON, BOMBAY, AND MEDITERRANEAN BANK *v.* NARRAWAY.

M. R.
1872
Dec. 6, 10.

[1871 L. 18.]

Set-off—Mutual Credit—Bankruptcy Act, 1849, s. 171—*Credit given to Firm—Bankruptcy of Partner—Party claiming Set-off Trustee only.*

5 PD 74

The Plaintiff Bank sold acceptances of theirs to *C. & Co.*, partly in consideration of acceptances of *C. & Co.* The firm of *C. & Co.* consisted of two partners, both of whom in 1866 executed assignments for the benefit of their separate creditors, one of which assignments was registered under the *Bankruptcy Act* of 1861, but the other was not; and the partnership affairs were afterwards wound up in a Chancery suit. At the time when these assignments were executed the acceptances of *C. & Co.* were not due and were in the hands of third parties, who afterwards re-assigned them to the Plaintiff Bank, in order that the Plaintiff Bank might establish a set-off against *C. & Co.*; and it was agreed that any moneys recovered by means of the set-off should be divided between the Plaintiff Bank and the holders of the acceptances in certain proportions:—

Held, that as there was no bankruptcy of the firm of *C. & Co.*, the Plaintiff Bank were not entitled to set off the acceptances of *C. & Co.* against the acceptances of the Plaintiff Bank.

Semble, that the Plaintiff Bank were only in the position of trustees of the acceptances of *C. & Co.*, and on that ground also were debarred from claiming a set-off.

PREVIOUSLY to August, 1866, *Bomanjee Pestonjee* and *Bomanjee Framjee Cama* carried on business in *London* under the firm of *Bomanjee Framjee Cama & Co.* (hereafter called *Cama & Co.* of *London*); and *Bomanjee Framjee Cama* carried on business in *Bombay* on his own account under the style of *Bomanjee Framjee Cama, Sons, & Co.* (hereafter called *Cama & Co.* of *Bombay*).

In January, 1866, the *Bombay* branch of the Plaintiff Bank sold to *Cama & Co.* of *Bombay* ten bills of exchange for £1000 each, drawn upon the Plaintiff Bank, and payable at their principal office in *London* three months after sight; and *Cama & Co.* of *Bombay* delivered to the manager of the said *Bombay* branch two bills of exchange for £5000 each drawn by *Cama & Co.* of *Bombay* on *Cama & Co.* of *London*, and payable six months after sight. All these bills were duly accepted. The Plaintiff Bank's accept-

See Re London Bombay & Mediterranean Bank, Exp. Cama 1872 Ch 644 41 LJ

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ances became due on the 23rd of May, 1866; and those of *Cama & Co.* of *London* on the 23rd of August, 1866.

In February, 1866, the *Bombay* branch of the Plaintiff Bank sold to *Cama & Co.* of *Bombay* certain other bills for sums amounting in the whole to £15,000, drawn on the Plaintiff Bank, and payable four months after sight. These bills were duly accepted, and ten of them, being for £1000 each, became due on the 11th of July, 1866, and two, being respectively for £3000 and £2000, became due on the 29th of July, 1866. In consideration for the last-mentioned bills *Cama & Co.* of *Bombay* paid the sum of £5000 in cash, together with a further sum in respect of exchange, and they also delivered to the manager of the *Bombay* branch two bills for £5000 each drawn by *Cama & Co.* of *Bombay* on *Cama & Co.* of *London*, and payable six months after sight. These bills were duly accepted by *Cama & Co.* of *London*, and became due respectively on the 11th and 29th of September, 1866.

The Plaintiff Bank were unable to meet those acceptances which fell due on the 23rd of May, 1866, and on the 1st of June, 1866, a memorandum of agreement between *Cama & Co.* of *London* and the Plaintiff Bank was signed, whereby it was agreed that a promissory note of Messrs. *E. Landau & Co.* for £10,000, held by the bank, should be deposited with *Cama & Co.* of *London* as a security for payment of the bank's overdue acceptances for £10,000 (then held by *Cama & Co.*) by the following instalments, with interest at the minimum rate of the *Bank of England*, from the 23rd of May, 1866, that is to say, £5000 on or before the 20th of June, 1866, and the balance on or before the 27th of July, 1866; the promissory note to be returned to the bank on due payment of such instalments, but in default of payment of either of such instalments the promissory note was to belong to *Cama & Co.* of *London* absolutely, who were, however, to account to the bank for any balance that might remain after payment of the said acceptances, and all interest and legal and other expenses that might be incurred in obtaining payment of the instalments, or the moneys due on the promissory note.

Default was made in payment of the instalment of £5000 on the 20th of June, 1866.

On the 20th of July, 1866, an order was made on a petition

presented on the 7th of the same month directing the Plaintiff Bank to be wound up.

By a deed dated the 6th of August, 1866, *Bomanjee Framjee Cama* conveyed all his real and personal estate to *John Beattie*, *James Hossack*, and *Dadabhoy Hormusjee Cama*, their heirs, executors, and administrators, upon trusts for the benefit of the creditors of *Bomanjee Framjee Cama*. This deed was not registered under the Bankruptcy Acts.

By a deed dated the 22nd of August, 1866, *Bomanjee Pestonjee* conveyed all his estate and effects, and particularly his share or interest in any partnership or firm, and the assets thereof (except his interest in certain premises at *Bombay*), to *William Frederick Narraway* and *Robert Davie Peebles*, to be got in, applied, and administered for the benefit of his creditors, as if he had at the date thereof been adjudicated bankrupt. This deed was registered under the *Bankruptcy Act*, 1861, and *Robert Henry Nesbitt* was afterwards appointed a trustee thereof in the place of *Robert Davie Peebles*.

In January, 1868, a bill was filed by *Narraway* and *Nesbitt* against *Beattie*, *Hossack*, *Dadabhoy Hormusjee Cama*, and *Bomanjee Framjee Cama*, for the purpose of obtaining a declaration that the partnership of *Cama & Co.* of *London* had been dissolved, and of taking the accounts and winding up the affairs of the firm; and a decree was made in this suit.

At the date of the order to wind up the Plaintiff Bank, and of the creditors' deeds executed by *Bomanjee Framjee Cama* and *Bomanjee Pestonjee* respectively, the firm of *Cama & Co.* of *London* were the holders of the Plaintiff Bank's said acceptances to the extent of £17,000; Messrs. *Gray, Dawes, & Co.* were holders thereof to the extent of £4000; Messrs. *Browne, Hunter, & Co.* to the extent of £2000; and the *Bank of England* to the extent of £2000; the *National Provincial Bank* were the holders of one of *Cama & Co.'s* said acceptances, and the *Union Bank* of *London* were the holders of the remaining three.

An agreement dated the 12th of November, 1869, was made between the *Union Bank* of the first part, the *National Provincial Bank* of the second part, *Gray, Dawes, & Co.* of the third part, *Browne, Hunter, & Co.* of the fourth part, and the official liquidators

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of the Plaintiff Bank of the fifth part, by which it was, amongst other things, agreed to the following effect:—1. That the *Union Bank* and the *National Provincial Bank* should forthwith deliver (and if necessary indorse, but without recourse) those which they respectively held of *Cama & Co.'s* acceptances for £20,000, to the Plaintiff Bank or the official liquidators; and the official liquidators should immediately afterwards take such steps and proceedings as might be necessary for setting off a sufficiency of the same against the Plaintiff Bank's acceptances, and recovering possession of *Landau's* promissory note; and for the purpose of such set-off the official liquidators should make use of, or as between the parties thereto should be deemed to have made use of the acceptances of *Cama & Co.* held by the *Union Bank*, by the *National Provincial Bank*, rateably and in the proportion of three to one. 2. That all costs of and incidental to the taking of the said steps and proceedings should (whether the same should be wholly or partially successful or not) be borne by the estate and effects of the Plaintiff Bank. 3. That if the official liquidators should fail to establish the said set-off and to recover *Landau's* promissory note, *Cama & Co.'s* acceptances should be delivered (and if necessary re-indorsed) by the official liquidators to the *Union Bank* and the *National Provincial Bank* respectively, and all the parties thereto should be restored, as far as circumstances would permit, to the same rights and liabilities as they respectively would have possessed and been subject to if the present agreement had not been made and executed. 4. That if the said set-off should be established or effectuated, and as a consequence thereof *Landau's* promissory note wholly or partially released from the claims of *Cama & Co.* of *London* and of *Bombay*, and of their respective representatives or assigns, the net proceeds so released of such promissory note should be disposed of as follows:—There should be paid out of the said net proceeds to the *Union Bank*, in consideration of the delivery and of the indorsement (if any) to be made by them pursuant to the first article, a dividend at the rate of 5*s.* in the £1 on the amount of the said acceptances held by them, and there should be paid out of the said net proceeds to the said *National Provincial Bank*, in consideration of the delivery and of the indorsement (if any) to be made by them pursuant to the first article, a dividend at the like

rate of 5*s.* in the £1 on the amount of the said acceptance held by them; and there should be paid out of the said net proceeds to *Gray, Dawes, & Co.*, in consideration of their concurring in the agreement, and thereby facilitating the making of the set-off, a dividend at the rate of 2*s.* 6*d.* in the £1 on the bills held by them, and there should be paid out of the said net proceeds to *Brown, Hunter, & Co.*, in consideration of their concurring in the agreement, and thereby facilitating the making of the said set-off, a dividend at the rate of 2*s.* 6*d.* in the £1 on the bill, all of the aforesaid payments to abate rateably in the event of the said net proceeds proving insufficient to provide for all of them in full; and as to the residue of the said net proceeds (which it was estimated might in the event amount to £4,250 or upwards) the same should become and be part of the general estate of the Plaintiff Bank, and be disposed of accordingly.

Meanwhile proceedings had been taken by *Narraway* and *Nesbitt* against Messrs. *E. Landau & Co.* to recover the amount of the promissory note. These proceedings were resisted by *Landau & Co.* on the ground that they ought not to be called upon to pay the note until they were released from being contributories of a company which had been amalgamated with the Plaintiff Bank. *Narraway* and *Nesbitt* thereupon applied to the liquidators of the Plaintiff Bank to release *Landau & Co.*, but they refused to do so, and on the 19th of February, 1870, wrote a letter, which, after stating that the Plaintiff Bank claimed to set off the acceptances of *Cama & Co.* against their own, concluded as follows:—

"As the *Bombay Bank* has not yet had time to establish the proposed 'set-off' its liquidators are naturally anxious to retain those names on the lists for the present in order that *Cama's* inspectors may in the meantime be prevented from realising the note or the securities which are deposited to meet it; but should the bank be successful in establishing such set-off an application will be made to the Court to sanction the removal of such names."

Subsequently Messrs. *Narraway* and *Nesbitt* succeeded in recovering from *Landau & Co.* a considerable portion of the moneys due on their promissory note, and such moneys were paid into Court in the suit of *Narraway* v. *Beattie* pursuant to an order dated the 7th of December, 1870.

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On the 31st of January, 1871, the bill in this suit was filed against all the parties to the suit of *Narraway* v. *Beattie*, alleging that the Plaintiff Bank were the holders of all the four bills of *Cama & Co.* for £5000; and that at the time when the Plaintiff Bank became such holders the moneys due on the note had not been recovered; and praying for declarations, 1, that the Plaintiff Bank were entitled to redeem the promissory note of *Landau & Co.*, and all moneys received in respect thereof on payment of the balance, if any, due from the bank to the firm of *Cama & Co.* of *London;* 2, that for the purpose of ascertaining the amount of such balance, the sums due to the bank from *Cama & Co.* of *London* in respect of the bills of exchange accepted by the firm and held by the bank ought to be set off against the sums due from the bank to the firm in respect of the bills of exchange accepted by the bank and held by the persons representing the firm; for relief on the footing of these declarations; and for an injunction to restrain the Defendants from dealing with the moneys recovered on the promissory note.

The nature of the arrangement under which the bank became holders of the acceptances of *Cama & Co.* did not appear in the bill, and was only discovered upon the cross-examination of one of the liquidators of the bank.

The suit now came on to be heard.

Mr. *Fry*, Q.C., and Mr. *H. Lake*, for the Plaintiffs:—

We claim a right of set-off under the mutual credit clause of the Bankruptcy Act of 1849 (12 & 13 Vict. c. 106, s. 171), which was in force at the time when the transaction took place. In *Hankey* v. *Smith* (1) it was decided that mutual credit may be constituted though the parties do not mean particularly to trust one another; and the provisions of the then Bankruptcy Act (which were substantially the same as those of the Act of 1849) were held to apply to a case where *A.* accepted a bill, which got into the hands of *B.*, who afterwards bought goods of *A.* This is a stronger case; for the bills accepted by *Cama & Co.* of *London* were given as consideration for those accepted by the Plaintiff Bank. It is

(1) 3 T. R. 507, n.

true that the bank parted with the bills, and that they were in the hands of third parties at the date of the bankruptcy; but the effect of that was only to suspend the right of set-off, not to extinguish it; and as the bills were, at the time when the promissory note was realised, and still are, in our hands, the right of set-off has revived: *Bolland* v. *Nash* (1); *Collins* v. *Jones* (2). Further, we are not mere trustees of the bills returned to us, but have a beneficial interest in the result of the set-off; and there is nothing illegal or improper in the arrangement which has been made with the parties entitled to these bills. In *Hawkins* v. *Whitten* (3) a person indebted to a firm of bankers took their notes after he knew that they had stopped payment; but it was held that he was entitled to set them off; and *Bayley*, J., in delivering the judgment of the Court, observed: "It may be true that he took these notes for the very purpose of making them the subject of his set-off and of getting in substance 20*s.* in the pound upon these notes; but as this has not been prohibited, we cannot say that it is illegal."

Sir *R. Baggallay*, Q.C., and Mr. *H. M. Jackson*, for *Narraway* and *Nesbitt*:—

First: The right of set-off claimed by the Plaintiff arises only in the case of a bankruptcy; and we say that there has been no bankruptcy here. There has been no bankruptcy of the firm of *Cama & Co.* of *London*; and as regards the individual partners, only one of them has executed a registered deed; the other has simply parted with his interest. That alienation effected a dissolution of the partnership, and accordingly a suit was instituted, a decree was made declaring the partnership dissolved, and the affairs of the partnership have been wound up in that suit; but there has neither been a bankruptcy of the firm nor anything equivalent to it. There is nothing in the Companies Acts equivalent to the mutual credit clause in the Bankruptcy Acts.

Secondly: The terms of the memorandum of agreement of the 1st of June, 1866, preclude the Plaintiff Bank from claiming a set-off, at all events to the extent claimed. That agreement was

(1) 8 B. & C. 105. (2) 10 B. & C. 777.
(3) 10 B. & C. 217.

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entered into after the Plaintiff's acceptances had become due, and at a time when the Plaintiff Bank might have been sued on them. The object of the agreement was to benefit the Plaintiff Bank, who were desirous of obtaining time from *Cama & Co.* It provides for payment of the acceptances by instalments; and the stipulation made was, that if an instalment was not paid, the promissory note in question was to become the absolute property of *Cama & Co.* of *London*, subject to a right in the Plaintiff to require them to account for any surplus which might remain after payment of the acceptances and costs. That right is the only one which the Plaintiff can enforce; and the set-off can be claimed only to the extent of that surplus, if at all.

Thirdly: Assuming the agreement of the 12th of November, 1869, to be one which the Court will recognise, still the Plaintiff Bank can at most have a set-off only to the extent to which they are beneficially interested in *Cama & Co.'s* acceptances: *Forster* v. *Wilson* (1).

Fourthly: In reality, however, the whole arrangement carried into effect by the agreement of the 12th of November, 1869, is a mere juggle, which a Court of Equity will not assist in any way. This is made perfectly plain by the letter from the liquidators of the 19th of February, 1870. The Plaintiff Bank have really no beneficial interest in the acceptances, but are only trustees or agents for the real owners, who have placed the acceptances in their hands simply with a view to this suit, and upon the terms that the plunder to be thereby obtained shall be shared between them. Upon the principles laid down in *Forster* v. *Wilson* there can be no set-off at all. In questions relating to set-off Courts of Law now look at the real position of the parties: *Watson* v. *Mid-Wales Railway Company* (2); *à fortiori*, a Court of Equity will do so.

Mr. *Southgate*, Q.C., and Mr. *Kekewich*, for *Beattie* and *Hossack*, referred to *Fair* v. *McIver* (3).

Mr. *Fry*, in reply.

(1) 12 M. & W. 191. (2) Law Rep. 2 C. P. 593.
(3) 16 East, 130.

LORD ROMILLY, M.R., after stating the facts, continued :—

The facts which I have stated shew that it is impossible there can be such a thing as set-off in respect of mutual credit in this case. In the first place, there is no bankruptcy of the firm of *Cama & Co.* of *London*. There is not even a registration in bankruptcy of a creditors' deed, except of one of the partners ; as regards the other, there is only an assignment to trustees, which has never been registered ; and with respect to the winding-up, the question of mutual credit does not arise. In that state of the case the Plaintiffs come and ask for the benefit of the 171st clause of the Bankruptcy Act, 1849, and they contend, that though a bill may have gone out of their hands, they do not lose the right which exists at the time of the bankruptcy if they can get the bill back again. It is admitted that they did not hold the bills at the time of the bankruptcy : more than that, it is quite plain that they are not now the beneficial holders of them : they are only entitled to them for certain purposes as trustees, and the case of *Fair* v. *McIver* (1), which has been referred to, appears to me a distinct authority upon that point. [His Lordship read the marginal note.] It also appears that these acceptances were not due at the time when the partners in *Cama & Co.* executed these assignments.

The result is, that in my opinion there is no ground for contending that the right of mutual set-off arose. There was in point of fact a bankruptcy only with respect to the separate estate of one of the traders, and that does not entitle the official liquidators of the Plaintiff Company, who are now being wound up, to claim the benefit of that clause of the statute from which I am of opinion they are barred in every way. I must therefore dismiss the bill with costs.

Solicitors : Messrs. *Lewis, Munns, & Longden ;* Messrs. *Uptons Johnson, Upton, & Budd ;* Messrs. *Waller & Handson.*

(1) 16 East, 130.

M. R.
1872
Dec. 12.

McARTHUR *v.* DUDGEON.

[1870 M. 133.]

Practice—Cross-examination—Items of Account—Insufficiency of Notice.

Where an accounting party is served with notice of cross-examination on his accounts, it is not sufficient to inform him that all the items except one are objected to, but the notice must specify the points on which the cross-examination is to proceed.

THIS was a motion, on behalf of the Plaintiffs in the suit, that the Defendant might be ordered to attend before a special Examiner to be cross-examined upon his accounts and the affidavits filed in support of them.

A decree had been made in the suit directing an account of certain partnership dealings between the Plaintiffs and the Defendant. The accounts left by the Defendant in Chambers comprised sums amounting in the whole to £40,000.

The Defendant's solicitor was informed that the Plaintiffs objected to all the items in the account except one, and he was afterwards served with a notice to attend for cross-examination.

The Defendant attended, but refused to be sworn, on the ground that the notice did not specify the points on which the cross-examination was to proceed.

Mr. *Southgate*, Q.C., and Mr. *Waller*, for the Plaintiffs, in support of the motion.

Sir *R. Baggallay*, Q.C., and Mr. *Smart*, for the Defendant:—

The notice is insufficient, inasmuch as it does not specify the particular items of account on which the Defendant is to be cross-examined.

We rely on Cons. Ord. xxxv., r. 34, and *Wormsley* v. *Sturt* (1) and *In re Lord's Estate* (2).

The MASTER OF THE ROLLS held, that the two cases cited on behalf

(1) 22 Beav. 398. (2) Law Rep. 2 Eq. 605.

of the Defendant established that the notice was insufficient, and that it was not enough for the Plaintiffs to intimate that they objected to all the items except one. He was entitled to know the points on which the cross-examination was to proceed. The General Order, however, did not apply to this case. The motion must be refused.

Solicitors for the Plaintiffs: Messrs. *Evans & Co.*
Solicitors for the Defendant: Messrs. *Cattarns & Co.*

V.-C. M.
1872
Dec. 17.

ROCK *v.* LAZARUS.

[1872 R. 145]

Copyright—Engraving—Name of Proprietor—Trading Name of Firm— 8 *Geo.* 2, *c.* 13, *s.* 1.

Where prints, engravings, and similar articles are the property of a trading firm, the proprietorship is sufficiently designated for the purpose of obtaining the protection of the Copyright of Designs Acts, by printing upon them the trading name of the firm, even though it does not contain the names of all the partners in the business.

THIS was a motion to restrain the Defendants from infringing the copyright claimed by the Plaintiffs in certain prints or engravings.

The bill stated that in and previously to the month of May, 1859, the Plaintiffs, whose names were *William Frederick Rock* and *John Payne*, carried on the business of wholesale and fancy stationers, in partnership with Mr. *Henry Rock* and Mr. *Richard Rock*, at 11, *Walbrook*, in the city of *London*, under the firm of "Messrs. *Rock & Co.*," as well also as "Messrs. *Rock, Brothers, & Payne*," and that they continued so to carry on the business down to the death of *Henry Rock*, which occurred in July, 1868, and that from that time the Plaintiffs and *Richard Rock* continued to carry on the business in partnership at the same place and under the same firms down to the death of *Richard Rock*, which took place in January, 1871, and that since then the Plaintiffs had continued to carry on the same business in partnership at the same place and under the same firms. It further stated that all the property in the successive partnerships, including the property and rights in the plates, engravings, and prints mentioned in the bill, were now vested in the Plaintiffs alone for their own benefit.

The engravings which the bill sought to restrain the Defendants from imitating consisted of a series of seven views of the town of *Great Yarmouth*, which were printed either separately on distinct sheets of paper or as headings to notepaper, or printed on distinct sheets and sewn together in a cover. The Defendants' imitation consisted of seven views similar to those of the Plaintiffs', sewn

together in a cover, which described them on the outside as "The *Leporello* Album of *Yarmouth* Views." The Plaintiffs' views had been published at various times between the years 1863 and 1871. Each print or engraving had on the publication line the words "*Rock & Co., London,*" together with a number for reference on one side, and on the other side the day of the date of the first publishing of the print or engraving.

The Defendants at the Bar offered to submit to a perpetual injunction, if costs were not asked against them, but the offer was refused.

Mr. *Glasse*, Q.C., Mr. *Chitty*, and Mr. *Shortt* (of the Common Law Bar), for the Plaintiffs:—

It has been suggested that there is a question whether the words of the statute of 8 Geo. 2, c. 13, s. 1 (1), under which the present question arises, have been sufficiently complied with by the description of the proprietors of the prints. It is clear, however, on the authorities, that what has been done is quite sufficient, and it would be absurd to say that the proprietors could not be traced by the description "*Rock & Co., London,*" which is the proper trading name of the Plaintiffs. *Graves* v. *Ashford* (2) is a

(1) The enacting part of sect. 1 of 8 Geo. 2, c. 13, began as follows:—

"Be it enacted that from and after the 24th day of June, which shall be in the year of our Lord one thousand seven hundred and thirty-five, every person who shall invent and design, engrave, etch, or work in mezzotinto or chiaro-oscuro, or from his own works and inventions shall cause to be designed and engraved, etched, or worked, in mezzotinto or chiaro-oscuro, any historical or other print or prints, shall have the sole right and liberty of printing and reprinting the same for the term of 14 years" [which by a later Act, 7 Geo. 3, c. 38, was extended to twenty-eight years], "to commence from the day of the first publishing thereof, which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints."

It then enacted certain penalties in case "any printseller or other person whatsoever, from and after the said 24th day of June, one thousand seven hundred and thirty-five, within the time limited by this Act, shall engrave, etch, or work as aforesaid, or in any other manner copy and sell, or cause to be engraved, etched, or copied and sold, in the whole or in part by varying, adding to, or diminishing from the main design, or shall print, reprint, or import for sale, or cause to be printed, reprinted, or imported for sale, any such print or prints, or any parts thereof, without the consent of the proprietor or proprietors thereof first had and obtained in writing, signed by him or them respectively in the presence of two or more credible witnesses."

(2) Law Rep. 2 C. P. 410.

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clear authority that the trading name is sufficient, the suggestion in that case being really that the description was too full. It is unnecessary to do more than give the surname of the proprietor: *Blackwell* v. *Harper* (1); *Newton* v. *Cowie* (2). Ignorance of the Plaintiffs' rights does not excuse the Defendants: *West* v. *Francis* (3); *Clement* v. *Maddick* (4); and the right to the injunction carries with it the right to the costs of the suit: *Burgess* v. *Hills* (5); *Kerr* on Injunctions (6).

Mr. *H. F. Bristowe*, Q.C., and Mr. *H. Ludlow*, for the Defendants:—

The prints in question were published on several different occasions, and on not one of them is the proprietorship correctly stated. It was an object of the Act to protect the public as well as the proprietors, and that protection cannot be given unless the names of all the proprietors are given. There is no case in which it has been held sufficient to name only one of several proprietors, and *Graves* v. *Ashford* (7) is a distinct authority the other way. The necessary inference from the judgment is, that if *Henry Graves* had had a partner the designation of the proprietorship would have been held insufficient. *Newton* v. *Cowie* was also a case in which there was only one proprietor. The object of requiring the names of all the partners in a firm to be specified is that the parties may know whom to sue: *Jefferys* v. *Baldwin* (8), just as under the *Ship Registration Act* the names of all the owners of a ship are required to be on the register: *Slater* v. *Willis* (9). Precision is as much required in the names of the proprietors as in the day of publication, which must be given exactly: *Matthieson* v. *Harrod* (10).

SIR R. MALINS, V.C., after stating the facts, continued:—

It is not disputed that the prints of the Defendants have substantially been made from copies of those of the Plaintiffs. The latter have consequently *primâ facie* a right to an injunction to

(1) 2 Atk. 93.
(2) 4 Bing. 234.
(3) 5 B. & A. 737.
(4) 1 Giff. 98.
(5) 26 Beav. 244.
(6) Page 228.
(7) Law Rep. 2 C. P. 410.
(8) Amb. 164.
(9) 1 Beav. 354.
(10) Law Rep. 7 Eq. 270.

5 Jur. N.S. 233

restrain their publication, and the Defendants would have been willing to submit to a perpetual injunction if the costs of the suit were not also insisted on. But as the Plaintiffs press for their costs as well, their right to an injunction has been strenuously resisted, on the ground of non-compliance with the terms of the *Copyright of Designs Act* as to inscribing the names of the proprietors on the objects sought to be protected.

I take it to be perfectly clear that the Plaintiffs are generally known as "Messrs. *Rock & Co.*," which is the name under which they trade. But it is said that merely to inscribe the trading name is not a compliance with the *Copyright of Designs Act*, because it does not give the names of the proprietors. Then the question is, What is required to be given as the name of the proprietor? Is his Christian name required as well as his surname? *Newton* v. *Cowie* (1) has already decided that the surname is sufficient. In the present case the name of the firm under which the Plaintiffs trade has been given; and since it has been decided that the whole name of the proprietor need not be put on a print or engraving, it appears to me to follow that it is quite sufficient to give the name of the firm under which the proprietors trade. Any one desiring to sue them has only to write and ask who are the partners in the business. The information given by putting the name of the firm on the print or engraving is therefore necessarily sufficient.

Mr. *Bristowe* says that it is the necessary inference from *Graves* v. *Ashford* (2) that the name of every proprietor should be inscribed, but I think that by no means follows from the words of the judgment. On the contrary, I infer from it that if *Henry Graves* had had a partner the designation would have been sufficient, and that the only question was, whether the addition of the words "and company," did not imply that he had a partner, and so lead to the false inference that he was not the sole proprietor. I think that the trading name of the firm is a sufficient designation, inasmuch as it enables parties to know whom to apply to for information, and whom they must sue. The Plaintiffs are, consequently, entitled to the injunction.

Solicitors: Mr. *T. H. Strangways*; Mr. *G. Noon*.

(1) 4 Bing. 234. (2) Law Rep. 2 C. P. 410.

V.-C. M.
1872
Dec. 20.

In re WIDNES RAILWAY COMPANY.

Deposit by Railway Company—Payment out of Court—Railways Construction Act, 1864—27 & 28 *Vict. c.* 121—*Casus omissus.*

The promoters of a railway company paid their deposit into Court under the *Railways Construction Act*, 1864, upon obtaining the usual certificate of the Board of Trade. The bill had passed through the House of Commons, and had passed the first reading in the House of Lords; but no further progress could be made, in consequence of the rules of the House requiring certain stages to be passed at an earlier period of the session :—

Held, upon petition for payment of the deposit out of Court, that although this case was omitted from the *Railways Construction Act*, the Court had power to make the order.

THIS was a Petition for the payment out of Court of a sum of £4790, which had been paid in by two promoters of the *Widnes Railway Company* by way of deposit upon obtaining the certificate of the Board of Trade required under the *Railways Construction Act*, 1864 (27 & 28 Vict. c. 121). The bill had passed the House of Commons during the session of 1872, and had passed the first reading in the House of Lords; but no further progress could be made, in consequence of the rules of the House of Lords requiring certain stages to be passed at an earlier period of the session.

Mr. *Henriques*, for the Promoters :—

A difficulty has been suggested in this case, in consequence of there being no provision made in the *Railways Construction Act* for the payment out of the deposit when a railway scheme has become abortive through the impossibility of passing the Act during the session of Parliament.

The 40th section of the Act provides for the payment of the money out in three cases only, that is, if within the time prescribed by the certificate the railway is opened for public traffic; or if, within the same period, the company shall prove to the satisfaction of the Board of Trade that one-half of its nominal capital is paid up; or, if the depositors shall execute a bond for the pay-

ment of the money required to be deposited in case the railway is not completed within the time limited.

None of these provisions apply to the present case, which is entirely omitted from the Act.

Mr. *Hemming*, who appeared for the Board of Trade, raised no objection to the Petition, but left it to the Court to decide whether the order could be made, this being clearly a *casus omissus* in the Act.

SIR R. MALINS, V.C.:—

It is evident that this particular case is not provided for by the Act; still, I think it is a case in which the Court ought to interfere, for otherwise there seems to be no means by which the depositors can obtain the money to which they are clearly entitled. I think, therefore, that the order should be made. The costs of the Board of Trade must be paid out of the fund.

Solicitor for the Depositors: Mr. *Reddish.*
Solicitors for the Board of Trade: Messrs. *Raven & Bradley.*

V.-C. B.

1872

Nov. 16.

In re STEEVENS' TRUSTS.

Will—Construction—Direction to divide a Sum of Money after a Life Estate "amongst the Heirs of my late Brother J. S."—Next of Kin Entitled.

4 P.D. 82
25 Ch D 213

Testatrix, after devising real estate to a devisee, "and to her heirs and assigns," bequeathed to her trustees £500 upon trust to invest and pay the proceeds to *E. R.* for life, and in case (which happened) *E. R.* should leave no child living at her (*E. R.*'s) decease, "then I direct my said trustees to divide the said sum of £500 . . . amongst the heirs of my late brother" *J. S.*:—

Held, that by the word "heirs" were meant the next of kin of *J. S.*, according to the *Statute of Distributions*, together with the widow of *J. S.*, if living at testatrix's death.

Ware v. *Rowland* (1) observed upon.

Petition.

Elizabeth Steevens, spinster, by her will, dated the 18th of August, 1821, devised to the widow of her brother, "and to her heirs and assigns for ever," certain real estate. She devised to three other persons, using the same words of limitation, three other specific portions of real estate respectively. She then proceeded to give and bequeath to trustees £400 stock, upon trust to pay the dividends to one of her nephews for life, then to his wife for life, and then to hold the stock upon certain specified trusts for the benefit of their children; but in case the nephew should leave no child living at his decease, or no child living at his decease who should attain twenty-one, then she directed the trustees to sell and divide the produce of the stock "amongst the heirs of my late brother *Joseph Steevens*."

Testatrix then gave and bequeathed to the trustees £500, upon trust to invest the same "upon such securities as they, my said trustees, may think best, at lawful interest, and that they do and shall pay the interest arising from the aforesaid sum of £500, as it shall become due, unto my niece, *Elizabeth Robinson*, for and during her natural life; and from and after her decease, my will is that the interest arising from the aforesaid sum of £500 should accumulate and be added to the principal, for the use of the children of my said niece, *Elizabeth Robinson*, to be paid to them

(1) 15 Sim. 587.

at such times and in such proportions as they, my said trustees, may think proper; but in case my said niece should leave no such child living at her decease, then and in such case I direct my said trustees to divide the said sum of £500, with the interest due thereon, amongst the heirs of my late brother *Joseph Steevens*."

Testatrix then made a bequest of £400 upon trusts that were similarly expressed, except that the ultimate gift, in default of children, was to one of her nieces simply, without any words of limitation. After some further legacies she bequeathed her residuary real and personal estate to "the five youngest children of my late brother *Joseph Steevens*" (naming them) "to be equally divided amongst them."

Testatrix died in 1829. *Elizabeth Robinson* had children, who all died in her lifetime. She died on the 19th of December, 1869.

The question, which arose only as to the £500, was, whether by the expression "the heirs of my late brother *Joseph Steevens*," was meant the heir-at-law of *Joseph Steevens* (who died in 1801), or his next of kin according to the *Statute of Distributions*, of whom his heir-at-law was one, and his niece, the above-mentioned *Elizabeth Robinson*, was another.

The trustees had paid a fund representing the £500 into Court.

Mr. *F. T. White*, for the Petitioners, who were some of the next of kin:—

The word "heirs" must here be construed as descriptive of the persons appointed by law to succeed to this kind of property: *Vaux* v. *Henderson* (1); *Evans* v. *Salt* (2); such persons being not the nearest of kin, but those who would be entitled under the Statutes of Distribution: *Doody* v. *Higgins* (3); *In re Porter's Trust* (4); *In re Gamboa's Trusts* (5); *In re Newton's Trusts* (6); *Herrick* v. *Franklin* (7).

Mr. *W. Pearson*, for Respondents, the trustees; one of whom was another of the next of kin:—

In a gift of personalty the word "heir" means next of kin. But

(1) 1 Jac. & W. 388, n.
(2) 6 Beav. 266.
(3) 9 Hare, App. xxxii.; 2 K. & J. 729.
(4) 4 K. & J. 188.
(5) Ibid. 756.
(6) Law Rep. 4 Eq. 171.
(7) Ibid. 6 Eq. 593.

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here, in addition, the word is in the plural, "heirs;" and there is the expression "amongst the heirs," shewing an intention to distribute.

Mr. *Blackmore*, for the heir-at-law:—

Where there is a simple gift of personal estate to the "heirs" of *A.*, that is a gift *primâ facie* to the heir-at-law of *A.*, as *persona designata*—not to the next of kin. In order to entitle the next of kin, there must be something on the face of the will to give to the words a sense other than their primary and natural meaning: *In re Rootes* (1); *Southgate* v. *Clinch* (2).

No such contrary intention appears here. From the gift of the residue to younger children an intention to benefit the heir may be presumed. Hence the heir takes: *Hamilton* v. *Mills* (3). Nor is there any distinction arising from the use of "heirs" in the plural: *De Beauvoir* v. *De Beauvoir* (4); *Pleydell* v. *Pleydell* (5).

The decision in *Evans* v. *Salt* (6) was expressly set aside by Lord *St. Leonards*, when Lord Chancellor, in *De Beauvoir* v. *De Beauvoir* (7), and was not followed by Vice-Chancellor *Kindersley* in *In re Rootes*.

In *Ware* v. *Rowland* (8) the words "to and among" the testator's "heirs-at-law, share and share alike," were held to designate the person or persons (in the event, his sister) who at his death filled the character of his heir-at-law. From this decision it follows that the word "amongst" makes no difference; which further appears from the observation, that where the testatrix wishes to make an equal distribution (as, for instance, amongst the descendants of *Elizabeth Robinson*), she uses the apt word "children." Here the word, as in the first clause of the will, is precise and technical, and must be construed accordingly.

Mr. *White*, in reply:—

In *In re Rootes* the gift was to the heirs of a person deceased

(1) 1 Dr. & Sm. 228.
(2) 4 Jur. (N.S.) 428; 27 L. J. (Ch.) 651; 6 W. R. 489; 31 L. T. 263.
(3) 29 Beav. 193.
(4) 3 H. L. C. 524.
(5) 1 P. Wms. 748.
(6) 6 Beav. 266.
(7) 3 H. L. C. 556.
(8) 15 Sim. 587; 2 Ph. 635.

at the date of the will. In *Southgate* v. *Clinch* (1) the word was in the singular—"next heir-at-law;" in *Hamilton* v. *Mills* (2) the limitation was to the "right heirs" of the survivor of two persons, a distinction pointed out by Lord *Romilly* in commenting, in the case of *In re Philps' Will* (3), on his own decision. *De Beauvoir* v. *De Beauvoir* (4) was the case of a mixed fund; as was also *Pleydell* v. *Pleydell* (5). In *Ware* v. *Rowland* (6) the legatee who took under the expression, "to and amongst my heirs-at-law share and share alike," filled the characters both of heir-at-law and next of kin of the testator at his death; and the contention was raised by parties who were the testator's co-heirs and next of kin at the legatee's death; so that the authority is not in point.

SIR JAMES BACON, V.C.:—

This is one of those cases which certainly call for the enactment of a code, or of some rule for the interpretation of expressions to be found in wills. In the midst of the "confusion worse confounded" which exists among the authorities on this subject, I must endeavour to put such a construction upon the language of this will as the general sense of the instrument requires.

Where the words of gift are "to the next heir," or "to the heirs-at-law," there seems to be comparatively little difficulty; but where the word is "heir" only, considerable doubt arises. And here, I confess, I was struck with the remark in the judgment in the case of *Ware* v. *Rowland* (7), where the Vice-Chancellor of *England* observes that it cannot be argued, with any shew of reason, that there is any substantial difference between the words "heirs-at-law" and "heirs." I should be very sorry to pronounce an opinion at variance with one of Sir *L. Shadwell*, who was so remarkable for his powers of construing ambiguous instruments; but, although I do not concur in the learned Vice-Chancellor's observation, I find sufficient peculiarity in the circumstances of that case to prevent my regarding it as a binding authority in the

(1) 4 Jur. (N.S.) 428; 27 L. J. (Ch.) 651; 6 W. R. 489; 31 L. T. 263.
(2) 29 Beav. 193.
(3) Law Rep. 7 Eq. 151, 153.
(4) 3 H. L. C. 524.
(5) 1 P. Wms. 748.
(6) 15 Sim. 587; 2 Ph. 635.
(7) 15 Sim. 587, 593.

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present instance. There the gift upon which the question turned was "to and among the heirs-at-law" of the testator himself, "share and share alike;" here it is to the heirs of a stranger.

Nor do I feel embarrassed by the observations which have been made upon the decision of Lord *Langdale* in *Evans* v. *Salt* (1). The remark of Lord *St. Leonards*, when Lord Chancellor, in *De Beauvoir* v. *De Beauvoir* (2) was made in a case which was one of a mixed fund of realty and personalty, and therefore inapplicable to the present; and in *In re Rootes* (3) the bequest was to the heirs of three deceased persons, which again was very different.

There are a variety of other cases in which the word "heirs" has been held to mean, not heirs-at-law but next of kin; and I think that, in this instance, it would be going not only against many authorities, but still more against the testatrix's plain and obvious intention, if I were to hold that by the word "heirs" she meant heir-at-law.

It is said that because the testatrix has picked out five of the children of her deceased brother, and given them shares in the residue, it is probable that she meant to confine the ultimate gift of this £500 to the single male person who was her brother's heir-at-law. In my opinion that circumstance leads to a directly opposite conclusion. It appears to me that where she wishes to benefit particular children she names them, and where she wishes to benefit all the children alike, not being able to express herself with legal accuracy, she has recourse to the word "heirs."

I do not say the result is clear, but I think, upon the whole, I cannot come to any other conclusion than that the testatrix intended to benefit the whole family of *John Steevens*.

I should observe that Mr. *Blackmore* pressed upon me the observation that, from the use of the words "heirs and assigns" in the devise of real estate, the testatrix must have known what were proper and what were improper words to use in bequeathing her property of different kinds. But no such words as "heirs and assigns" occur in this bequest. If it had been a simple gift to the heir-at-law of *Joseph Steevens*, the result might have been altogether different.

(1) 6 Beav. 266. (2) 3 H. L. C. 556. (3) 1 Dr. & Sm. 228.

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Mr. *Pearson* said if the widow should be living she would be entitled to a share with the next of kin. There was no statement as to this fact.

THE VICE-CHANCELLOR made a declaration that by the word "heirs," the next of kin of *Joseph Steevens* were indicated; and directed the Petition to be amended by stating either that there was or was not a widow of *Joseph Steevens* living at the death of the testatrix; the costs of all parties, and the costs, charges, and expenses of the trustees to be paid out of the fund in Court; and if there should be, or have been, a widow of *Joseph Steevens* living at the testatrix's death, that the fund should be divided so as to give her or her representatives a share with the next of kin.

Solicitors: Messrs. *Letts*; Mr. *Whale*.

MURRAY *v.* CLAYTON.

V.-C. B. 1872 *Nov.* 14, 16.

[1869 M. 30.]

Patent—Injunction—Discovery—Names and Addresses of Purchasers—Names and Addresses of Agents.

A patentee of improvements in brick-cutting machines, who was a manufacturer of the machines by an agent at the agent's works and not a licenser, having obtained a perpetual injunction against Defendants, who were also manufacturers of brick-cutting machines, from infringement, the Defendants were ordered to file an affidavit stating the number of machines made by them since the date of the patent, and the names and addresses of the persons to whom the same had been sold, and of the agents concerned in the transactions. Upon motion to vary the order:—

Held, that the Plaintiff was entitled to have discovery of the names and addresses of the purchasers, but not of the agents concerned, there being nothing to shew that any agents had been employed.

ADJOURNED SUMMONS.

This was a summons on behalf of the Defendants to vary an order of the Court.

By an order of the Lords Justices, dated the 6th of May, 1872, a perpetual injunction was granted to restrain the Defendants from infringing the Plaintiff's patent, which was for improvements

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in the construction of brick-cutting machines, with an inquiry as to damages; see the report (1).

By an order made in Chambers in this branch of the Court, dated the 16th of July, 1872, the Defendants were ordered, on the Plaintiff's application, to file an affidavit stating the number of brick-cutting machines made by them since the 8th of June, 1866, the date of the patent, "and the names and addresses of the persons to whom the same respectively have been sold, or for whom the same have been purchased, and the names of the agents concerned in the transactions."

The Defendants made an affidavit stating the number of machines made by them since the 8th of June, 1866, but not stating the names and addresses of the purchasers, and afterwards took out the present summons to vary the order of the 16th of July, 1862, by striking out the words in inverted commas above.

The situation of the Plaintiff was this: He employed an agent to manufacture and sell brick-making machinery fitted with his patent, but the manufacture was carried on in workshops which were the property of the agent; and the Plaintiff did not issue licenses.

A summons on behalf of the Plaintiff, questioning the sufficiency of the affidavit, was set down to be heard at the same time. The Defendants opened their summons first, and in so doing said they were willing to let the order of the 16th of July, 1862, stand, on the undertaking of the Plaintiff that he would not take proceedings against any of the purchasers whose names might be thereby disclosed; but the Plaintiff declined.

Mr. *Fooks*, Q.C., Mr. *Aston*, Q.C., and Mr. *E. Carpmael*, for the Defendants:—

The order, so far as it is directed to the names and addresses of the purchasers, is excessive.

A patentee, who is not a manufacturer of the machines fitted with his invention, having obtained a decree for damages against an infringing manufacturer, by reason of use or vending of the invention, cannot claim from the Defendant, by way of damages, a manufacturing profit: *Penn* v. *Jack* (2). We contend that the

(1) Law Rep. 7 Ch. 570. (2) Law Rep. 5 Eq. 81.

Plaintiff is a person who is not a manufacturer within the meaning of the above rule, and that, not being entitled to a manufacturing profit by way of damages, he cannot insist upon having the names and addresses of purchasers.

The principles on which this Court proceeds when an interim injunction is applied for pending an action are explained in *Bridson* v. *Macalpine* (1).

In an action for infringement, the account at common law, under the 42nd section of the 15 & 16 Vict. c. 83, extends to the profits actually made by the Defendant only, not to the loss of the Plaintiff: *Elwood* v. *Christy* (2); and if the Plaintiff be the assignee of a patent, the account will be directed only from the date of the assignment (3).

Mr. *Higgins*, Q.C., and Mr. *Melville*, for the Plaintiff:—

The object of the motion is to postpone the inquiry in Chambers as long as possible, there being an appeal pending.

The VICE-CHANCELLOR observed that no consideration of that kind would influence him; and desired to hear the argument on the merits.

Mr. *Higgins* and Mr. *Melville*:—The order is in the common form. No attempt was made to comply with it, to impeach it, to qualify it, or to get further time until after the affidavit was filed, and not till then did the Defendants seek to vary the order.

"The Defendant must, if required, ... set out . . . . the names and addresses of all persons from whom he has received sums of money in respect of royalties or licenses to use the patent article:" *Kerr* on Injunctions (4), referring to *Crossley* v. *Stewart* (5); *Howe* v. *McKernan* (6); and *à fortiori* after decree; *Delarue* v. *Dickinson* (7); *Leather Cloth Company* v. *Hirschfield* (8); *Tetley* v. *Easton* (9).

The words here excepted to have been the subject of judicial

(1) 8 Beav. 229, 232.
(2) 18 C. B. (N.S.) 494.
(3) Ibid; 5 N. R. 12.
(4) Page 437.
(5) 1 N. R. 426; 7 L. T. (N.S.) 848.
(6) 30 Beav. 547.
(7) 3 K. & J. 388.
(8) Law Rep. 1 Eq. 299.
(9) 18 C. B. 643.

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decision, even before this cause came to a hearing: *Penn* v. *Bibby* (1); *Betts* v. *Neilson* (2).

Mere inspection of the books is not sufficient: *Telford* v. *Ruskin* (3); *In re Saxby's Patent* (4).

[They also cited: *Davenport* v. *Rylands* (5); *Betts* v. *De Vitre* (6); *Swinborne* v. *Nelson* (7); *Ord* v. *Fawcett* (8); *Tagg* v. *South Devon Railway Company* (9); *Brown* v. *Perkins* (10); *Taylor* on Evidence (11); *Brinsmead* v. *Harrison* (12).]

Mr. *Fooks*, in reply, referred to *Millington* v. *Fox* (13); *Stokes* v. *City Offices Company* (14), and *Nunn* v. *Albuquerque* (15).

SIR JAMES BACON, V.C.:—

This case has taken a long time to argue, although it relates to the most ordinary matter of practice. A good many cases relating to trade-marks, and the infringement of patents, and granting of injunctions, have been cited in the course of the argument, which have really no application to the present matter in dispute.

The decree is in the plainest possible terms. It directs an inquiry as to what compensation is to be paid by the Defendants in respect of the damage sustained by the Plaintiff by reason of the Defendants' infringment of the Plaintiff's letters patent. As a matter of course, in prosecuting that inquiry, the Plaintiff is entitled to have from the Defendants the fullest possible discovery. That is so well settled that no case can be referred to in which that practice is called in question. Among other things the Plaintiff is entitled to that which the order gives him—the names and addresses of the persons to whom machines were sold; and if the order had stopped there I should have thought that no objection could successfully have been made to it. The

(1) Law Rep. 3 Eq. 308.
(2) Ibid. 3 Ch. 429, 440.
(3) 1 Dr. & Sm. 148.
(4) Law Rep. 3 P. C. 292.
(5) Ibid. 1 Eq. 302.
(6) Ibid. 3 Ch. 429.
(7) 16 Beav. 416.
(8) 19 L. J. (Ch.) 487.
(9) 12 Beav. 151.
(10) 2 Hare, 540.
(11) 6th Ed. ii. 1267, 8; §§ 1317, 8.
(12) Law Rep. 6 C. P. 584.
(13) 3 My. & Cr. 338.
(14) 13 L. T. (N.S.) 81.
(15) 34 Beav. 595.

words are: "Make and file an affidavit or affidavits stating the number of brick-cutting machines made or caused to be made by them since the 8th day of June, 1866, the date of the Plaintiff's letters patent mentioned and referred to in the first paragraph of the bill in this cause, and the names and addresses of the persons to whom the same respectively have been sold, or for whom the same have been purchased." To that, according to the ordinary settled practice of the Court, the Plaintiff would be entitled. Then follow these words: "and the names of the agents concerned in the transactions," of which I can make no sense, and which do not seem to be in the slightest degree necessary for working out the right which the Plaintiff has under the decree. If it should at any future time be necessary in any state of circumstances properly brought under the notice of the Judge in Chambers, then, of course, an inquiry might be made about agents, when one knows that there have been any agents, or any transactions in which agents have been concerned. In my opinion the order is erroneous in the part which contains those words relating to the agents who were concerned in the transactions.

There are two summonses before me, one by the Plaintiff to consider the sufficiency of the affidavit, and the other by the Defendants, in which they ask for a variation of the order in the manner there specified, namely, by striking out these words, "and the names and addresses of the persons to whom the same respectively have been sold, or for whom the same may have been purchased, and the names of the agents concerned in the transactions, or to vary such order by striking out such words, unless the Plaintiff will undertake not to take or threaten to take any proceedings against any of such persons or agents without the permission of the Court, and to make such other order in relation to the matter of this application as to this Court may seem just." That is the gravamen of the Defendants' application, because they apprehend, whether their apprehension be well founded or not, that if they were to furnish the Plaintiff with the names and addresses of the persons to whom they have sold machines, the Plaintiff might feel inclined to attack them, and issue processes against them; and that, as a consequence, the business of the Defendants would

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be injured. That is a consideration to which I can in no degree attend. If the inconvenience which they apprehend should ever happen, it will be in consequence of that which, as the law now stands, has been decided to be a wrong done by the Defendants. They cannot excuse themselves, or avoid the discovery which is asked, because of any consequences which may ensue from their wrongdoing. I have no reason at present to believe that any such inconvenient consequences will ensue. If I had positive proof, I could not, therefore, interfere. I could not alter the order of the Lords Justices by adding to it such a condition as this, and I could not, under the circumstances, impose on the Plaintiff any such undertaking as is sought; and yet that is the sole object of this motion. The affidavit, to which I need not refer more particularly, expresses it in the most distinct terms. It does not suggest any reason why I am at liberty to alter the practice of the Court, or the terms of that order, so far as it is in accordance with the practice of the Court. No doubt the Court will, as has been argued very strongly, do its best to keep the litigation within its proper bounds; but if, by reason of this suit, the Plaintiff should have any remedy against any other persons not parties to this suit, I cannot by anticipation interfere so as to prevent him taking any proceedings he may be advised to take. I therefore cannot comply with the terms of that summons, further than to vary the order of the 16th of July, by taking from it the words which I have mentioned.

The other summons is as to the sufficiency of the affidavit. Now the affidavit is, on the face of it, insufficient. It does not admit of argument, and there is no question about it. It is insufficient no doubt because it does not furnish that information which the Defendants were bound to give.

All I can do is to direct the order of the 16th of July to be varied in the manner I have mentioned; and upon that summons I can give no costs on either side.

On the other, which is considered as the affidavit summons, I find the affidavit to be insufficient; and there must be a further affidavit made, and the costs of that summons, I think, ought not to be reserved.

It is unnecessary for me to say, nor indeed has it been argued, that the right of the parties cannot be affected by reason of the pendency of the appeal. In justice to Mr. *Fooks* I ought to say he has argued no such thing. I observe upon it only for this reason: The Defendants having applied to the Lords Justices to suspend the execution of this decree, the application was unsuccessful. The Lords Justices have decided that whatever may be done hereafter, in the meantime the inquiry must go on; and it is the subject of the inquiry upon which I am now engaged. The affidavit required by the order and by the practice of the Court must be made, and with the consequences of it, which the future must determine, I cannot interfere in the slightest degree.

There will be one order on the two summonses.

Solicitors for the Plaintiff: Messrs. *Vallance & Vallance.*

Solicitors for the Defendants: Messrs. *Wilson, Bristow, & Carpmael.*

COVERDALE *v.* EASTWOOD.

[1871 C. 137.]

Marriage—Statements in Writing by Wife's Father of intention to settle—Agreement made upon consideration of Marriage.

After proposals of marriage had been accepted, the lady's father wrote to the intended husband as follows:—"*V.* being my only child, of course she will come into the possession of what belongs to me at my decease." In a subsequent letter, addressed to the mother of the intended husband, the father, after declining then to extract £4000 from his business, and stating that some years since he had made a will leaving "all my property" in trust for his daughter for life for her separate use, and the principal to be divided as she by her will might ultimately dispose of, he said, "It has been my intention, in the event of the marriage taking place, to make a similar will in accordance with the facts of the case, and of course I should settle my property (subject to my sister's annuity) on my daughter absolutely and independent of her husband; or, in other words, in strict settlement." He further "agreed" to allow his daughter and her husband £100 a year during his life; and added, "I will take care that my property (which, I suspect, will exceed £4000) shall be properly secured upon her and her children after my death." The marriage having taken place, the father, who was then a widower, afterwards married again, and made a will whereby he

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devised and bequeathed parts of his property to his wife, and gave several life annuities.

Upon bill by the daughter, claiming to have all the property of which the testator died seised or possessed settled upon her in strict settlement:—

Held, that the above expressions of intention on the part of the testator amounted to a contract to settle the whole of the property of which he should die seised or possessed upon the Plaintiff in strict settlement.

12 Ch D 779
Sq D 360
17 Ch D 363.
8 App Cas 469.

MOTION FOR DECREE.

In July, 1862, *Frederick John Coverdale* made proposals of marriage to *Veronica*, only child of *Richard Eastwood*, which were accepted, subject to the father's approval; and on the 22nd of July, 1862, Mr. *Eastwood* wrote to Mr. *Coverdale* a letter containing the following passage:—

"I am not what the world calls a rich man, and what capital I possess, or nearly so, is embarked in a large cotton business with a relation of mine, and in the management of a large farm here. *Veronica* being my only child, of course she will come into the possession of what belongs to me at my decease, and probably I should be able to make her some small allowance during my lifetime. I mention this, because the world, I understand, gives me credit for being more wealthy than I really am, and I wish to be plain and straightforward with you in this matter."

The marriage was fixed to take place in July, 1863, and in that month Mrs. *Coverdale*, the mother of *Frederick John Coverdale*, wrote to Mr. *Eastwood*, stating that her son was willing to settle £4000 on Miss *Eastwood*, and inquiring whether he was inclined to make a corresponding settlement on her.

On the 6th of July Mr. *Eastwood* wrote as follows:—

"In answer to your letter I have merely to observe that I am not in a position at the present moment to extract £4000 from my capital invested in trade, for the purpose of settling the same on my daughter. Some years ago I made my will, by which I left all my property to certain trustees therein named, upon trust to make all my estate into money, and invest the same on government or real security, and pay the interest to my daughter during her life, independent of any husband with whom she might intermarry, and the principal to be divided as she by her will might ultimately dispose of. It has been my intention, in the event of

the marriage taking place, to make a similar will in accordance with the facts of the case, and of course I should settle my property (subject to my sister's annuity) on my daughter absolutely and independent of her husband, or in other words in strict settlement. This is all I am in a position to do at the present time (without crippling my resources) beyond the fact of having agreed to allow the young couple £100 per annum during my life, which, if your son wishes it, I am willing to give a bond for its due payment. I quite agree and approve of your observations, but *Veronica* being an only child there is not the same absolute necessity for the settlement of her money as there would have been had I had other children. I will take care that my property (which I suspect will exceed £4000) shall be properly secured upon her and her children after my death."

The marriage took place on the 16th of July, 1863, and there were issue several children.

At the date of the marriage *Richard Eastwood* was a widower. In 1865, he married again, and in 1868 he made another will, whereby he purported to give his household goods and effects to his wife for life, and after her decease to his daughter "absolutely and beneficially." He bequeathed his dairy stock to his wife "absolutely and beneficially." He also bequeathed to his wife all his interest in the house and farm called *Thorneyholme*, then occupied by him, and so much of the farm buildings as might be requisite for her use, for life, free from rent, and after her death he directed the same to fall into and form part of the farm to which it belonged, thereinafter bequeathed. He bequeathed his leasehold estate in the farm then occupied by him, called *Staple Oak*, subject, however, together with the other farms then occupied by him, to the life interest of his wife, to *John Lewis* absolutely and beneficially. The rest of *Thorneyholme* and other farms in his occupation he gave, subject to the life interest of his wife, to trustees upon trust either to farm or sublet the same, and to pay the balance of the rents and profits to his daughter during the continuance of the term, "her executors and administrators, absolutely and beneficially." He gave and bequeathed to trustees his leasehold mill, cottages, and machinery at *Clow Bridge*, upon trust to receive the rents and profits, and after payment of expenses, to pay to his

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wife an annuity of £250 during her life, also to pay his sister *Ann Guinan*, widow, an annuity of £150 during her life, also to pay certain sums for the maintenance and advancement of one *Henry Sagar*, an articled clerk, and to pay the balance to his daughter "absolutely and beneficially," and after the satisfaction of the same trusts, he bequeathed the same mill, cottages, and machinery to his daughter, "her executors, administrators, and assigns, absolutely and beneficially." He gave and devised all his mansion-house, farm, and premises called *Swinshawe*, and all the residue of his real estate to his daughter, "her heirs and assigns, absolutely and beneficially." He bequeathed to his cousin *Mary Lewis*, spinster, fifty shares in the *Whitewell Mining Company*, absolutely and beneficially. He gave and bequeathed the residue of his personal estate to his daughter, "her executors, administrators, and assigns, absolutely and beneficially."

On the 17th of May, 1871, *Richard Eastwood* made another will (his last), and on the 29th of May, 1871, he died, having regularly paid the £100 a year to Mr. and Mrs. *Coverdale* up to his death.

By his will he bequeathed his household goods and effects unto, and equally between his wife and his daughter. He devised his freehold dwelling-house, called *Springfield Cottage*, to his wife, her heirs and assigns, absolutely, and he also bequeathed his leasehold interest in a farm then in his possession, and his live and dead farming stock and crop therein, to his wife absolutely; and gave her a legacy of £500. He devised his estate called *Swinshawe*, and all other his real estate not thereinbefore devised, and bequeathed the residue of his personalty, to trustees upon trust to sell and convert, and to invest and stand possessed of the fund upon trust out of the income to pay his daughter for life an annuity of £250, and to pay the remainder of the income as follows; one-third to his wife for life; one other third to his sister, *Ann Guinan*, for life; and the remaining third to his sister-in-law, *Elizabeth Grimshaw*, for life; and subject to the payments aforesaid, the capital as well as the income of the fund were to be in trust for his daughter absolutely.

The bill was filed by Mrs. *Coverdale*, by her next friend, against the widow, the acting trustee of the will, the two other life

annuitants, the infant children and the husband, alleging that the testator did not, save as appeared from the will, make any settlement upon her or upon her children, and that he died seised and possessed of property amounting, so far as she had been able to ascertain, to about £18,000.

The bill alleged that the Defendant *Frederick John Coverdale* was ready and willing to settle £4000 on the Plaintiff, and prayed for a declaration "that the hereinbefore stated letters of the said *Richard Eastwood* amount to and constitute a contract by him for valuable consideration to settle the whole of the property of which he died seised or possessed, or at all events the sum of £4000, out of his estate, upon the Plaintiff in strict settlement, and in priority to the claim of any creditor of the said *Richard Eastwood*;" and for other consequential relief.

The Defendants, the widow, the acting trustee, and the annuitants, by their answer denied that the marriage "was solemnized on the faith of the representations or statements contained in" the letters, "or in the belief by the Plaintiff or her husband that the whole of" the testator's "property would, as represented by him, be settled by him on the Plaintiff, for," they said, "such marriage was definitely arranged and fixed a considerable time before July 1863, and independently of" the letters . . . "and without any reference whatsoever to the settlement of any property or money by" the testator, "by deed, will, or otherwise."

The answer further stated that the testator's estate was proved under £12,000, and the Defendants believed that after payment of debts it would not amount to more than £4000. The estate was being administered in another suit.

The Plaintiff made an affidavit in which she said that her marriage was solemnized "entirely upon the faith of the representations and statements contained in the said letters . . . and in the belief which was entertained both by me and by my said husband, that the whole of his property would, as represented by him, be settled by him upon me." She said she believed she shewed the draft of the will of 1868 to her husband.

In support of the Defendants' case the solicitor who prepared the will of 1868 deposed that several alterations were made in the draft, as he believed at the suggestion and request of the Plaintiff

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and her husband; and that when the draft was finally settled the Plaintiff and her husband expressed themselves perfectly satisfied therewith, and did not raise the question of such will being a compliance or non-compliance with the promise of a settlement."

Some letters were also relied on by the Defendants, as supporting the case of acquiescence on the part of the Plaintiff. In one of them, a letter addressed by the Plaintiff to Mrs. *Eastwood*, dated the 7th of March, 1868, she said: "With regard to the will I can never thank you enough for persuading papa to let you lend me the sketch of it, as it has saved any further disagreements. It appears to me all quite right as far as I can judge, but do you think papa would let me see the draft of it, as there might be several little things which could be settled now, but could not be altered afterwards; and of course as papa can do as he likes, he would not be obliged to make any alterations we might suggest, if he did not approve them, so there would be no harm done."

There was no evidence to shew what was meant by the reference of the testator in the letter of the 6th of July, to his "sister's annuity."

Mr. *Kay*, Q.C., and Mr. *Nalder*, for the Plaintiff:—

This is an agreement made upon consideration of marriage within the statute (29 Car. 2, c. 3, s. 4), and hence binding on the estate of the testator who made the contract: *Saunders* v. *Cramer* (1); *Moorhouse* v. *Colvin* (2); *Laver* v. *Fielder* (3).

The precise contract was, to leave everything the testator could leave; or as he expressed it in the second letter "all my property."

By the widow's answer the point is not raised as a disputed question. The solicitor says he communicated knowledge of the contents of the will to the wife, and that from her a sort of assent was obtained. But there is nothing to shew that the husband ever heard of the terms of the will. The letter is valueless, unless it be effectual to avoid the contract made with the husband.

(1) 3 Dar. & Wr. 87. (2) 15 Beav. 341.
(3) 32 Beav. 1.

Mr. *Amphlett*, Q.C., for the Defendants, the husband and the infant children :—

We say that the contract embraces and provides for the children; and that no arrangement after marriage can alter or disturb their rights.

The real question is, whether the expression of intention on the part of a promissor when followed by action on the part of the promissee, amounts to a contract. On this point we rely on the observations of Lord Chancellor *Cottenham*, in *Hammersley* v. *De Biel* (1), whose judgment was affirmed by the House of Lords.

Mr. *Little*, Q.C., and Mr. *E. S. Ford*, for the Defendants, the executors and trustees of the will, and the three life annuitants:—

The case as against creditors has been abandoned.

Mr. *Amphlett* abandons the second theory of the bill, that the contract was to settle £4000. He says he, on behalf of the children, is not interested in the first letter at all; children being mentioned only in the second letter.

We contend that the second letter contains no such contract as this Court will enforce. It is only a statement of the present intention, which was to be carried out "in accordance with the facts of the case;" *i.e.*, was to be subject to alteration. Did the husband ever accept the testator's offer? There is no proof that he married the daughter on the faith of the representation of intention. As a denial of that proposition the letter of the 7th of March, 1868, is most material. It is not a question of the wife having, after marriage, agreed to vary her rights; the question is whether the rights existed.

Neither the husband nor the wife explicitly denies that either of them ever saw the will. The parties have simply put their own construction upon what the letter meant.

We could not raise the point by answer, because the letter did not come out till the affidavit as to documents was filed.

The question of how far the expression of an intention to settle amounts to a contract must depend upon the language of each particular case. An instance which negatived the proposition is

(1) 12 Cl. & F. 45, 62, n.

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Randall v. *Morgan* (1), referred to in *De Beil* v. *Thomson* (2), and commented on by Lord *St. Leonards* in *Maunsell* v. *White* (3), which decision was affirmed on appeal (4). Other instances of promises so vague that the Court would not enforce them, are *Kay* v. *Crook* (5); *Stroughill* v. *Gulliver* (6).

Then as to Mr. *Coverdale's* part of the contract—he agreed to settle £4000; but he never did settle that amount; he only now offers at the Bar to do so. He has receded from the terms of the contract, which, consequently, on this ground also, cannot be enforced.

The Plaintiff claiming as a purchaser for value must prove her case. There must have been an offer by one party, accepted by the other. As to the £4000, the testator refused to settle that sum; and the only occasion on which the word "agreed" is used, is where he is speaking of allowing the young couple £100 a year, a contract which he strictly fulfilled.

The cases will be found collected in *White* and *Tudor's* Leading Cases in Equity (7).

SIR JAMES BACON, V.C.:—

The facts of this case are quite clear, and not open to any sort of contradiction or doubt. By the facts of the case, I mean, not only the statements in the affidavits, but the two instruments referred to in the bill, which seem to me to be clear beyond the possibility of question.

A gentleman advanced in life, a widower, with an only daughter, has a proposal for her marriage made to him by a gentleman, of whom it appears he entirely approves, and the letter in which he expresses his approval contains this passage:—[His Honour read the first extract given above, and continued:—]

I think that letter explains quite sufficiently what was then the intention of the testator in this case, and what ensued upon the writing of that letter. To make a present settlement, he says, is out of his power. He desires to keep his capital in the large

(1) 12 Ves. 67.
(2) 3 Beav. 469, 475.
(3) 1 J. & Lat. 539, 569.
(4) 4 H. L. C. 1039.
(5) 3 Sm. & Giff. 407.
(6) 2 Jur. (N.S.) 700; 4 W. R. 684; 27 L. T. Rep. 258.
(7) 4th Ed. vol. i. p. 782.

cotton business, and in the large farm of which he speaks; but announces to the intended husband that his only child will "of course come into the possession of what belongs to me at my decease."

How far that might have amounted to a contract under other circumstances, it is not necessary here to inquire, because the intended husband having proposed, and being willing, to settle a sum of £4000, his mother writes a letter to the testator, and urges him also to make a settlement. The contents of that letter are not before the Court, but the substance of it is proved by the mother's affidavit. In answer, the letter dated the 6th of July, 1863, was written by the testator, and it is upon that letter principally that the case must be decided. In that letter, answering Mrs. *Coverdale*, the testator says:—[His Honour read the second of the above extracts, and continued:—]

Taking these facts together, it appears that the testator desired to have the control of his own property for the purposes of his business in the state of investment in which it then was, but the purpose on his part that whatever property of his might exist at the time of his death should be settled upon his daughter, in the manner here expressed, is clear and distinct. This is addressed to the mother of the intended husband, in answer to a proposition that the husband should settle £4000, and to a request (as I gather from the letter I have been reading) that the father, the testator, should also settle £4000. The letter proceeds to make it clear beyond the possibility of doubt:—"It has been my intention, in the event of the marriage taking place, to make a similar will." The nature of his existing will, if it was then existing, was expressed in the previous paragraph, "in accordance with the facts of the case." Now it has been suggested that that must mean in accordance with such facts as shall exist when I make my will, or at the time of my death, or at some other time. I cannot so hold, because the words do not permit me so to hold. The event here spoken of is the event of the marriage, and the facts of the case would be influenced or changed by the event of marriage. If a marriage should take place, then, consistently with that fact, he says he shall make a will similar to that which he has before made—"And of course I should settle my property, subject to my sister's

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annuity"—as to what that means I have not had any explanation—"on my daughter absolutely and independently of her husband, or, in other words, in strict settlement."

Now I am told that this gentleman was, or had been, a professional man. Whether he was or not the words he has used must have their proper signification. It seems to me impossible for anybody to hesitate about the meaning of this stipulation—this undertaking—on the part of the father, when the proposition is made that he should settle £4000. He undertakes that he will settle all his property in strict settlement upon his daughter in the event of the marriage taking place. "This," he says, "is all I am in a position to do at the present time (without crippling my resources) beyond the fact of having agreed to allow the young couple £100 per annum during my life, which, if your son wishes it, I am willing to give a bond for its due payment." Then, to make it still more clear, if it required further clearance, he says, "I will take care that my property (which I suspect will exceed £4000) shall be properly secured upon her and her children after my death."

I must say, in my opinion, if any words can be said to express a clear meaning and intention—a positive undertaking and contract—these words are sufficient for that purpose; because these words are used at a time when a marriage is impending, a marriage to which the father has given his consent, which did take place shortly afterwards, and which, as cannot for a moment be disputed, did take place in consideration, among other things, of the promise which had been made by the father to settle his property in strict settlement upon the Plaintiff and her children.

It has been observed that the case alleged by the Plaintiff in the bill that the marriage took place upon that consideration cannot be proved; and that that is shewn by what afterwards took place. I should be very slow to adopt what afterwards took place as a reason to satisfy me that this allegation cannot be true; but it is proved by the mother, by the husband, and by the wife, that the marriage did in fact take place in consequence of that letter, and on the footing of that letter, and to that there is no sort of contradiction. Mr. *Little* has endeavoured with great ingenuity, by referring to the letters which passed between the Defendant, Mrs. *Eastwood*,

the widow, and the Plaintiff, Mrs. *Coverdale*, in the year 1868, to shew that that could not have been the ground upon which the marriage took place. They do not shew any such thing. If I attached any importance to those letters, which I am not at liberty to do, as affecting the rights of the parties, I cannot safely draw any conclusion from them to the effect that Mr. *Little* contends for. I cannot say that because the Plaintiff, if she was competent, was willing in the year 1868 to give up some of the advantages which she had stipulated for, or which somebody had stipulated for, in 1863, that therefore it was not in consideration of those latter advantages that the marriage took place. I take the evidence to be clear and distinct that the marriage proceeded upon the contract which I have read from the letter of 1863. There would have been no doubt upon the subject except from the accident that this gentleman, being, when he entered into this contract, a widower of a certain age, and not then contemplating the possibility of a second marriage, did afterwards marry again. But he could not by his marriage withdraw from his contract.

That representations of this kind will constitute a contract is shewn beyond the possibility of question by every case which has been referred to, as well by those in which the contract has been enforced, as by those in which the Court has found it impossible to establish the contract because it rested simply in intention, or because the thing to be settled was so vague that it was impossible for the Court safely to say what had been contracted for. In all the cases where the contract is clear in its terms, where the amount is not a sum to be ascertained hereafter, but is certain, as in this instance, there has been no difficulty or doubt whatever.

The principle of law goes even further, as was observed in a a judgment by Lord *Cottenham* in a case which was decided upon its own particular facts. The *Statute of Frauds* having been relied upon, that objection was overruled, and the case was decided on its own particular facts, in the only way, as far as I can judge, in which it ought to have been decided.

But there is also this larger principle, that where a man makes a representation to another, in consequence of which that other person contracts engagements, or alters his position, or is induced to do any other act which either is permitted by or sanctioned by the

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person making the representation, the latter cannot withdraw from the representation, but is bound by it conclusively. That principle, as I conceive, must apply in its fullest extent to this case.

What took place between these two ladies in the way of correspondence I am not at liberty to attend to. A married woman could not, under any circumstances, bind herself; still less could she bind her children by any relinquishment, if she were capable of making a relinquishment, of rights which she then possessed. That she was aware of her rights by no means appears; whether she was or not I think, for this purpose, is entirely indifferent. But it must be observed, also, that all the weight which could, under any circumstances, belong to that suggestion is removed, when it is recollected that the thing then talked about was a will which was made in 1868, and that the will in question, which is the subject of the present suit, was not made until 1871. So that the correspondence cannot be said in any sense to have reference to the existing will of 1871.

As I have said, this gentleman, for reasons which he thought were valid and sufficient at the time, and which are not unreasonable in themselves, agreed with the intended son-in-law that he the testator, should have the control and possession of his property for his commercial and other purposes all the days of his life, and that when the day of his death arrived everything that he possessed should be the property of his only child, and then, moreover, that it should not be a mere gift to her, but that it should be so settled as to ensure a provision for herself and for her children after her. I cannot think of anything more reasonable or proper on his part, except only that he did not contemplate that he might afterwards marry. He did afterwards marry. He was in the position of *Benedict* in the play, who says, "When I said I would die a bachelor I did not think I should live till I were married." Except that circumstance, there is nothing in the transaction to take it out of its being a contract for valuable consideration, to be performed by the person who was bound to perform it, and liable to be performed by the person on whom the obligation lies.

I think the Plaintiff is entitled to a decree.

There will be a declaration that the letters of *Richard Eastwood* amount to and constitute a contract by him for valuable conside-

ration to settle the whole of the property of which he died seised or possessed (after payment of funeral and testamentary expenses) upon the Plaintiff in strict settlement, subject to the claim of any creditor of Mr. *Eastwood;* with an inquiry as to the particulars of such property; then an order that a proper settlement be prepared and executed by and under the direction of the Court accordingly; and that the Defendants, other than the children of Mrs. *Coverdale*, and all other necessary parties (if any) shall join in such settlement.

As the estate is being administered there is no necessity for an injunction or a receiver.

The reference to Chambers for a settlement will also include the £4000 offered by the husband to be settled.

Proceedings will be stayed against Mr. *Little's* clients.

Mr. *Kay*, upon the question of costs, observed that if costs were allowed to Mr. *Little's* clients they must come out of the settlement fund, which was the property of the Plaintiff and her children.

The VICE-CHANCELLOR observed that the principal Defendants were defending the suit by an order in the administration suit, and that if they had to pay costs they must pay them personally, which would be very hard, and allowed them their costs.

Solicitors for the Plaintiff: Messrs. *Collyer-Bristow, Withers, & Russell.*

Solicitors for the principal Defendants: Messrs. *Shaw & Tremellen*, agents for Messrs. *Creeke & Sandy, Burnley.*

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OWEN *v.* DELAMERE.

[1871 O. 10.]

Administration—Liability of an Executor who continues the Business of his Testator—Remedy of Creditor.

A testator having directed his executors, at their discretion, either to wind up or to continue his business (that of a clothier), with power to apply the capital employed in the business in carrying it on, and to employ in such business any money, part of his general estate, the executors elected to continue the business, but did not, as they said (and the contrary was not proved), employ more of the assets in carrying on the business than were so employed at the testator's death.

Upon bill by a person alleging himself to be a creditor of the business since the death, on behalf of himself and all the other creditors of the testator, seeking administration of the testator's estate which had been employed in the business, there being no suggestion of insolvency:—

Held, that the remedy of the Plaintiff was not an administration decree in this Court, but an action at law.

Cause.

John Tyrer, by his will, dated the 18th of August, 1859, gave the following direction:—

"And I direct my executors or executor, at their or his discretion, either to wind up or dispose of, or to continue either alone or in conjunction with any person or persons, any business in which I might be engaged at my death, and which I may not have bound my executors to continue; provided always that no such business shall be carried on except with the consent, in writing, of my said wife *Ann*. And I hereby declare that it shall be lawful for my said executors and executor, at their or his discretion, to apply the capital employed in any business which they may continue to carry on in carrying on such business, and, with such consent as aforesaid, to employ in such business any money, part of my general estate; all such capital or money so employed to bear interest at five pounds per cent. per annum, payable half-yearly. And I hereby declare that all profits arising from the said business, above the said interest of five pounds per cent., shall form part of my residuary estate, and my share in all losses to be incurred in such business shall be paid out of the said capital of

my residuary estate. And I hereby declare that it shall be lawful for the said trustees or trustee to employ such persons in winding up, disposing of, or carrying on any such business at such wages or salaries as they or he shall think fit."

The testator died in 1859, possessed of considerable personalty, but having no real estate. The will was proved by two of the three executors, namely, *Daniel Delamere* and *Ann Tyrer*, his widow.

The testator, at his death, was carrying on the business of a clothier at *Beaumaris*, which business he had not bound his executors to continue. The acting executors, with the consent of *Ann Tyrer* (she being one of them) continued this business after the testator's death.

On the 7th of March, 1871, this bill was filed by *Richard Owen*, on behalf of himself and all other the unsatisfied creditors of *John Tyrer*, deceased (the testator), against *Delamere* and *Ann Tyrer*, alleging that the Defendants had continued the testator's business in conjunction with his son, *Robert Tyrer* (since deceased), and had also employed in the business so continued not only the capital employed by the testator in carrying on the business, but also a large sum of money part of the testator's general estate; also that in the course of such continuance the business had become largely indebted, and, amongst others, to the Plaintiff in the sum of £386.

The bill charged that the debts of the business were, under these circumstances, debts which ought to be satisfied out of the testator's capital employed by him in the business in his lifetime, and out of the moneys, part of his general estate, which had been employed in the continuance of the business; and that the Defendants had refused to pay the £386; and prayed for an administration of the testator's personal estate as in a creditors' suit, for a receiver, and, if necessary, an injunction, and for accounts.

The Defendants, by their answer, denied that they had continued the business in conjunction with *Robert Tyrer*, and said that they had employed him only as a superintendent. They admitted having employed in the continuation of the business the capital employed by the testator at his death, the amount and particulars of which they stated; but said they had employed no part of his general estate in carrying on the business. They admitted having incurred debts to sundry tradesmen, which they were willing to

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pay. They denied that the business was indebted to the Plaintiff in a sum of £386, or in any sum. They submitted whether the debts of the business were or were not debts which ought to be satisfied out of the capital employed at the death of the testator, or out of his general estate. They were willing, "as between ourselves and the Plaintiff, but not further or otherwise," to admit, and did to that extent admit, assets.

The question of whether the Plaintiff had any provable debt against the estate at all was in dispute; and the evidence on this point will be found discussed in the judgment.

Mr. *Swanston*, Q.C., and Mr. *Horton Smith*, for the Plaintiff:—

These executors were not bound to carry on any business, but they had a discretionary power, with the consent of the widow, to do so. They chose to carry on the business, and so choosing, they were empowered to use in the business not only the capital employed at the testator's death, but (with like consent) any money, part of the general estate. We say they have—they say they have not—applied part of the general estate beyond the capital employed at the testator's death. Be that as it may, to the extent to which they have applied the assets, we say that the Plaintiff (assuming him to have since the death become, and now to be, a creditor) has a right to have the estate administered in equity for the benefit of himself and the other creditors subsequent to the testator's death: *Ex parte Garland* (1); *Ex parte Richardson, In re Hodson* (2); *Cutbush* v. *Cutbush* (3); *Lindley* on Partnership (4).

Supposing *Robert Tyrer* to have been not a partner, but only an agent, that does not absolve the executors from liability as undisclosed principals: *Thompson* v. *Davenport* (5).

Mr. *Kay*, Q.C., and Mr. *Bardswell*, for the Defendants:—

The suit is a novelty, without sanction in precedent or authority. Assuming the Plaintiff to be a creditor (which we deny), he cannot have administration as in a creditors' suit in this Court. The

(1) 10 Ves. 110.
(2) Buck, 202, 209; 3 Madd. 138.
(3) 1 Beav. 184.
(4) Pages 1053–5.
(5) Sm. L. C., 6th ed. vol. ii. p. 338.

cases cited are either cases of actual bankruptcy, or, as in *Cutbush* v. *Cutbush* (1), of practical insolvency.

No doubt, where an executor trading with his testator's assets becomes bankrupt, not only his own estate, but the assets authorized by the testator to be employed in the business, are distributable amongst the creditors; and no proof against the bankrupt estate can be made in respect of assets so employed: *Scott* v. *Izon* (2).

But here there is no suggestion of insolvency; and we deny the allegation that the executors have employed any of the general assets, beyond what were employed in the business at the death.

Farhall v. *Farhall* (3) shews that a man cannot by contract with an executor acquire a right to prove in an administration suit as against the estate, though the executor has given him a lien on certain specific assets.

Mr. *Swanston*, in reply:—

There is abundant authority for such a bill as this. The leading case is *Hankey* v. *Hammond* or *Hammock* (4), which, to the extent of the creditor's remedy against assets authorized by the testator to be employed in the business, is not displaced as an authority by the observations of Lord *Eldon* in *Ex parte Garland* (5), or of Lord Justice *Turner* in *M'Neillie* v. *Acton* (6).

In *Thompson* v. *Dunn* (7), the creditor's lien on the goods employed with the testator's direction in trade, was not questioned by Lord Chancellor *Hatherley*.

Cutbush v. *Cutbush*, was an administration suit in this Court, and the circumstance that the assets are sufficient can make no difference in the principle.

Wilkes v. *Lister* (8) supports the same view (9).

(1) 1 Beav. 184.
(2) 34 Beav. 434.
(3) Law Rep. 7 Ch. 123.
(4) Buck, 210; 3 Madd. 148, n.; 1 Cooke, Bank. Law, 67.
(5) 10 Ves. 121.
(6) 4 D. M. & G. 744, 752–3.
(7) Law Rep. 5 Ch. 573, 576.
(8) 6 Esp. 78.
(9) To the above cases may be added *Thompson* v. *Andrews* (1 My. & K. 116); and *Gavin* v. *Hadden* (Law Rep. 3 P. C. 707). It has been ascertained that, in the case of *Thompson* v. *Dunn* (Law Rep. 5 Ch. 573), upon the accounts being furnished, the Plaintiffs abandoned further prosecution of the suit, which was never brought to a hearing.

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SIR JAMES BACON, V.C.:—

I think this suit is altogether misconceived. I think it proceeds upon principles which are not applicable to the facts of the case stated.

The case upon the bill is this: The Plaintiff claims to be entitled as a simple contract creditor in respect of money lent and advanced, or paid and laid out, nominally on behalf of one person but really on behalf of the Defendants—a simple case in which, if it be true, he can recover in an action at law, without the slightest difficulty. It is quite true that the testator did commit his estate to the care of his executors, with an authority to them to carry on business. What is the consequence of that? They carry on the business; they carry it on upon their own responsibility, and they have the testator's estate as a capital with which they can trade. How does that concern the creditors? The creditors have a right to be paid by the persons with whom they have contracted. They contracted, the Plaintiff says, with *Robert Tyrer*, who represented the firm, who was either principal, or agent with undisclosed principals. There is no difficulty in bringing an action at law; it is, as stated in the bill, as clear and plain a case in respect of a simple contract, as can be. The Plaintiff says that the business was carried on, and that the testator's estate was employed in it. In the 4th paragraph it is stated, "In the course of such continuance and carrying on of the said business as aforesaid it has become largely indebted, and (amongst others) the said business is indebted to the Plaintiff in a sum of £386." That can only be in respect of the contract which the Plaintiff alleges in the bill. The sum can easily be recovered at law, and there is no reason in the world why a bill should be filed in this Court. The case of *Hankey* v. *Hammock* (1) does not appear to me, as far as it goes, an authority that applies to the present. The extent of the authority of that case is greatly questioned by Lord *Eldon* in *Ex parte Garland* (2); but without waiting to observe upon this, it is sufficient to say that that case is totally different from the present; the testator there having appointed executors, and having authorized them to entrust his wife to carry on the trade, which for a time she did carry on, and debts having been no doubt contracted in the course of

(1) Buck, 210; 3 Madd. 148, n. (2) 10 Ves. 110.

carrying on that trade. Then came in the executors, and said, "You shall do this no longer," and took possession of the whole estate. The bill there was filed for the purpose of making available claims against the trust estate of which the executors possessed themselves; they not being personally liable in the slightest degree to the Plaintiff. The Plaintiff was interested in the trust they had to execute, and for that purpose he came against the trust estate. *Ex parte Richardson* (1), and especially *Ex parte Garland* (2), which contains a clear, distinct, luminous exposition of law on the subject, shew that such transactions are of this nature: An executor authorized to carry on business, carries it on; he is liable for every shilling on every contract he enters into; besides that, if he becomes bankrupt, the persons who have trusted him have a right to say that that portion of the trust estate which was committed to him for the purpose of carrying on the business shall not be the subject of general administration. It is not the general estate of the testator, as in *Ex parte Richardson*, that is liable to this equity, but only so much as he has authorized to be employed in the business. There can be no proof whatever on the part of the testator's estate against the bankrupt estate, unless the executors have gone beyond the limit of their trust; in which case the amount of excess may be proved for in the bankruptcy as a debt due to the estate of the testator. These principles are clearly and distinctly laid down in *Ex parte Garland*, are confirmed in *Ex parte Richardson*, and adopted in *Cutbush* v. *Cutbush* (3). There can be no doubt about the principles on which a Court of Equity deals with a case, not like that before me, but a case in which the same elements are contained; that is to say, the Court will give effect to the trust which has been created by the testator, and will keep separate and applicable only to purposes of the trust that estate which the testator designated and directed to be employed for that purpose. As Lord *Eldon* points out in the case of *Ex parte Garland*, the creditor has not only the personal remedy against the executor, but he has a right also, if that should fail, to come against the trust estate; and so, here, if an action had been brought against

(1) Buck, 202; 3 Madd. 138. (2) 10 Ves. 110.
(3) 1 Beav. 184.

V.-C. B. 1872 OWEN v. DELAMERE.

these Defendants, and a fruitless judgment had been recovered against them, there would have been a right to go against that trust estate which the testator committed to the executors, if it should be in existence, in specie. No such case is stated upon the bill.

The evidence in support of the claim is, no doubt, excessively feeble; it does not at all amount to the proof of a debt. If it did, it would still not be recoverable in this form. What the Plaintiffs are entitled to is, to be paid, by the persons with whom they have contracted, the amount which is due on the contract—that, and no more. The law is very clearly established in the case I have referred to; and I think the evidence in this case, if it were not so, is wholly deficient, because, without criticising too minutely the circumstances mentioned in Mr. *Roberts'* affidavit, I do not think that it is made out that the money is due from the business. If creditors of the business—persons who trusted what is called "the business"—had sued the business or the representative of the business, and had recovered judgment, and then a loan had been made to satisfy those judgments, that might have been something like a case. It is not so. What is said here is only that the first sum of £12 7*s.* therein appearing was a sum paid by *Richard Owen* to Messrs. *Field & Co.*, solicitors, of *Lincoln's Inn Fields, London*, for debt and costs in an action against *Robert Tyrer*, brought by one *Bowen*, for trade goods supplied to the firm or business of *Tyrer & Son;* that is to say, brought against *Robert Tyrer*, who, for anything that appears, may have had the money from *Tyrer & Son*, and ought to have paid it, but neglected to pay it, and therefore was sued for the sum he owed. The other two sums of £70 and £10 are not stated so positively as the first; but the deponent says those sums, "as I believe," were advanced by *Robert Owen.* That can only be from *Robert Owen's* information, and from no knowledge of his own, as I must understand from what he says: "The sums of £70 and £10 were also advanced by the said *Richard Owen*, as I believe, to satisfy a claim of Messrs. *Jones & Co.*, of *Liverpool*, clothiers, who had supplied the said business of *Tyrer & Son* with trade goods; and the said claim was therewith satisfied." That, in my opinion, carries it no further, and is no proof of a loan for the purposes of the concern.

"The item of £32 16*s.* was advanced by the said *Richard Owen* to pay off one *Frederick Bidgood*, an execution creditor, who had recovered judgment in an action for trade goods supplied to the said business of *Tyrer & Son*, and had put an execution on the premises, as appears by the warrant now produced and shewn to me marked A. The claim was satisfied with the said money, and the stock-in-trade and other property on the premises which had been seized were released." The execution was against Mr. *Robert Tyrer* alone. What possible right had they to seize those goods, which were not the goods of *Robert Tyrer* alone, or of his principals or servants? There was an execution put into the premises, and it was satisfied, and Mr. *Owen* is supposed — I say "supposed"—to have lent the money to stay that. If it stood, therefore, on the evidence, I should say the evidence was not sufficient to establish the character of creditor on the part of the Plaintiff.

It is not on that point that I deal with this case, but on the ground I have mentioned before—that the bill states a simple contract debt, for which the Defendants are liable, either through their agents—they being undisclosed principals—or otherwise, it is quite immaterial which—they having carried on the business, as they admit they did, or as it is alleged by the bill they did, and having become indebted for money paid and advanced on account of the business. In my opinion, if any such claim exists (I do not say whether it does or not), it ought to have been pursued by an ordinary action at law, and there is no reason in this case why recourse should be had to the estate of the testator, which the Defendants say is sufficient to satisfy the demand, and when the Defendants say they are able, willing, and ready to satisfy any demand that may be made against them. I am of opinion, therefore, that the bill must be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Sharp & Ullithorne*, agents for Messrs. *Owen & Roberts, Beaumaris.*

Solicitors for the Defendants: Messrs. *Wright & Venn*, agents for Messrs. *Payne & Son, Liverpool.*

V.-C. W.
1872
Nov. 4, 5.

BROWN *v.* WALES.

[1872 B. 209.]

Discovery—Identity of Parcels—Lessor and Lessee—Multifariousness.

Bill by a reversioner against overholding tenants under expired underleases, alleging that the Defendants were wrongfully in possession of certain parcels comprised in the original lease, and had in their possession divers documents which would shew that the said parcels were comprised in the said lease and the underleases, but refused to produce them, and were colluding together to defeat the Plaintiff. The Defendants demurred generally and for multifariousness, but the Court overruled the demurrers.

Identity is as much matter of title as devolution.

By an indenture of lease, dated the 17th of June, 1763, *Deborah Bryon* and *John Piston* being entitled as tenants in common to certain lands at *Walworth*, demised to *Thomas Clutton* a parcel of ground at *Walworth*, and also certain closes known as *Walworth Fields*, containing eight and a half acres, another close containing two acres, and another close containing seven and a half acres, lying dispersedly in *Lock's Fields*, for ninety-nine years from *St. John* the Baptist's Day then next ensuing, at a rent of £50 per annum. The lease contained a provision against digging brick-earth under a penalty of £500.

Clutton took possession under the lease, and by an underlease, dated the 1st of October, 1763, he demised to one *William Odber* all those parcels of meadow land, situate, lying, and being dispersedly, containing seven and a half acres, from the 29th of September, 1763, for the term of ninety-six years, at a rent of £15 per annum.

By an indenture, dated the 25th of March, 1785, *Clutton*, for considerations mentioned in the deed, assigned the said seven and a half acres to *Wright* for the then residue of the term of ninety-nine years (but subject to the said underlease), and covenanted to pay the rent of £50 reserved under the lease of the 17th of June, 1763.

All the property comprised in the lease of the 17th of June, 1763, became vested in *Margaret Piston*, and by indentures of lease, dated the 7th and 8th of February, 1776, were settled, on her

marriage with Mr. *Richard Clark*, upon the wife and husband for life, and issue of the marriage. In 1839 *John Crosby Clark*, the surviving son, became entitled to one moiety absolutely, and to the other as tenant in tail. By indenture of lease and release, dated the 24th and 25th of April, 1839, duly inrolled, he barred the estate tail, and acquired the absolute interest in all the property comprised in the lease of the 17th of June, 1763. The lease of the 17th of June, 1763, expired on the 24th of June, 1862. The rent reserved thereby had been always duly paid, and on the expiration of the lease all the property comprised in the said lease except the seven and a half acres comprised in the underlease of October, 1763, were delivered up to Mr. *Clark*, and shortly afterwards a further portion, part of the seven and a half acres, called *Salisbury Row* block, but owing to the difficulty of proving that certain other properties were included in the seven and a half acres, he never obtained possession of them.

Mr. *Clark* died on the 31st of July, 1869, and under the residuary devise in his will the Plaintiff became entitled to the whole of the seven and a half acres comprised in the underlease to *Odber*, except a portion thereof called the *North Street* block, which the testator had disposed of in his lifetime.

The land comprised in the underlease of October, 1763, had been built over, and had become changed in character.

William Odber, by indentures, dated the 20th of March, 1801, and the 23rd of December, 1802, demised separate parcels of land, being parts of the said seven and a half acres, to a Mr. *Brandon*, and Mr. *Roddis*. By his will, dated the 17th of November, 1806, he bequeathed his leasehold estates lying in *Lock's Fields* to *Griffith*, *Shepherd*, and *Rosseter*, on trust to pay the rents to his daughter, *E. Hall*, for life, and after her decease on trust to sell his leasehold estate either by public sale or private contract. *Rosseter*, the surviving executor, in 1824, the testator's daughter being then dead, caused all the leasehold property comprised in the underlease of October, 1763, being the said seven and a half acres, to be offered for sale by public auction in three lots, No. 2 of which was purchased by a Mr. *Poole*, and No. 3 by a Mr. *Bicknell*. On the 8th of March, 1825, the remaining lot, No. 1, was sold to a Mr. *Pugh*, who, by the conditions of sale, was to take an assignment of the

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underlease of October, 1763, subject to underleases of lots 2 and 3 to *Poole* and *Bicknell*. On the completion of the sale, the original underlease and the counterparts of certain other underleases were delivered to *Pugh*. Prior to 1859 the Defendant *Wales* purchased from *Pugh*, or his representatives, all the leasehold parcels and premises comprised in the underlease of October, 1763, and by an indenture, the date and particulars of which the bill alleged were unknown to the Plaintiff, all the parcels and premises contained in the underlease of October, 1763, were assigned by *Pugh* to the Defendant *Wales*. On this occasion divers deeds and documents shewing the devolution of *Pugh's* interest were, as the bill alleged, handed over to the Defendant. Between this purchase and 1859 the Defendant *Wales* acquired *Wright's* interest under the indenture of the 25th of March, 1785; and by an indenture, unknown to the Plaintiff, all the premises comprised in the underlease of October, 1763, under the description of seven and a half acres pasture land lying dispersedly in *Walworth Fields*, were assigned to the Defendant for the then residue of the term. On this occasion various deeds and documents shewing the devolutions of title were delivered over to the Defendant *Wales*. The Defendant *Wales*, subsequently to his purchase from *Pugh*, or his representatives, of the premises comprised in lot 1, which included the whole of the parcels contained in *Odber's* underlease, dated the 1st of October, 1763, *i.e.*, the whole of the seven and a half acres, subject to numerous sub-leases, also acquired, by purchase or surrender, those portions sold by *Rosseter* to *Bicknell* and *Poole*. The original underlease to *Odber* expired on the 1st of October, 1859. In 1862 the interest derived from *Wright's* lease, dated the 25th of March, 1785, also expired when the Plaintiff became entitled to the whole of the parcels comprised in the original lease, dated the 17th of June, 1763. The Defendant *Wales*, on being applied to to deliver up possession of the different premises comprised in the underlease of October, 1763, alleged that he had previously sold his interest in some of the parcels to Messrs. *Snewin* and *Brown*, and in others to one *George Beard*, who was his son-in-law (since dead and now represented by his executrix, *Wales's* daughter). As to these sales, the bill alleged that they were colourable, that the property was still managed by *Wales*, and the alleged vendees were trustees for

him, and alleged that the Defendant *Wales* had colluded with the other Defendants, and had delivered over certain documents to enable him to resist the Plaintiff's claim.

The bill alleged that the Defendants were in wrongful possession of certain portions of the seven and a half acres included in the said original lease of the 17th of June, 1763; that they were well aware that the said parcels were included in such lease, and also in the underlease of October, 1763; and that they had in their possession or power "divers documents and papers which, if produced, would clearly shew that the said parcels were so included in the said lease and underlease, but they refuse to deliver up possession of the said parcels, or any of them, or to produce the said documents for the Plaintiff's inspection, or to afford him any information respecting the said parcels, documents, or papers. The said documents contain accurate descriptions of the said seven and a half acres."

The bill prayed that the Defendants respectively might make a full discovery.

All the Defendants demurred to the bill generally, and for multifariousness.

Mr. *Lindley*, Q.C., and Mr. *Bradford*, for the Defendants *Wales* and *Brown*, the alleged purchasers.

Mr. *Dickinson*, Q.C., and Mr. *Ferrers*, for the Defendant *Snewin*, the co-purchaser with *Brown*.

Mr. *Miller*, Q.C., and Mr. *Davey*, for the Defendant *Beard*, the daughter of *Wales*:—

This is a bill for discovery, but an unusual one. The Plaintiff has the original lease of the 17th of June, 1763, or the counterpart. He alleges in the bill that he knows his title, and does not ask any relief in respect of that, but he wants the Defendants to prove for him his right to particular parcels. The answer to this is, that the Defendants are under no obligation to give up the muniments as to intermediate dealings with the property, neither would the documents in question shew the Plaintiff's title.

Secondly, he asks what he can obtain at law in the action which he intends to bring. The *Common Law Procedure Act*, s. 36,

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provides that in all actions or proceedings the Judge may compel a party to allow an inspection of documents in all cases where a bill for discovery might have been filed.

Thirdly, the demurrer must be allowed for multifariousness. It may be that the Plaintiff might include all the Defendants in one action, but the defence of each must necessarily be separate, and there would be four distinct actions in which the Defendants would be the only witnesses except as to one action. The demurrer must, therefore, be allowed: *Fenton* v. *Hughes* (1); *Story's* Eq. Pl. (2).

The *Solicitor-General* (Sir *G. Jessel*), Mr. *Greene*, Q.C., and Mr. *Hanson*, for the bill:—

It is not necessary to entitle the Plaintiff that the matters for which discovery is sought should relate to title. It is enough if it be in aid of the case made by the bill, even though they may affect Defendant's title, and where it is denied that they would establish Plaintiff's title: *Smith* v. *Duke of Beaufort* (3); *Earp* v. *Lloyd* (4); *Jenkins* v. *Bushby* (5).

Further, this is a case between landlord and tenant, and it is the duty of the latter to preserve boundaries: *Attorney-General* v. *Fullerton* (6).

On the objection as to multifariousness, the bill distinctly alleges that the Defendants are colluding together to defeat the Plaintiff. Such an objection, therefore, cannot be maintained.

Mr. *Lindley*, in reply.

SIR JOHN WICKENS, V.C.:—

I am of opinion that these demurrers must be overruled.

The object of the bill is to obtain discovery so as to enable the Plaintiff to recover possession of part of the property comprised in the original lease of June, 1763, which, it is alleged, is wrongfully withheld. According to the statements of the bill, parts of the seven acres and a half cannot, by reason of building and altera-

(1) 7 Ves. 287.
(2) 5th Ed. p. 287.
(3) 1 Hare, 507.
(4) 3 K. & J. 549.
(5) 35 L. J. (Ch.) 400.
(6) 2 V. & B. 263.

tions, be identified without the production of the instruments, or some of them, which have been from time to time executed in dealing with the property. The Defendant *Wales* refuses to give any information. In this state of things the Plaintiff has filed this bill for discovery.

It is said that the Plaintiff does not ask discovery in aid of his title, but in order to discover what he is entitled to; and that the documents are essentially the Defendant's title and not the Plaintiff's: but identity is as much a part of title as devolution. Suppose, for example, a map on the lease or the counterpart, that would be as much a part of title as the operative part of the deed. On general grounds, therefore, I should hold that these demurrers must be overruled.

But, independently of that, there is in the relation of lessor and lessee a principle which distinguishes cases between them from other cases. A lessor is entitled to have the boundaries kept distinguished on the principle laid down in *Attorney-General* v. *Stephens* (1).

Then, on the question of multifariousness, it is observed that to a bill of discovery it is an ultra-technical objection, even if well founded. In the present case it is alleged, and admitted by the demurrer to be true, that *Wales* and the other Defendants are colluding together to resist the Plaintiff's claim. And in *Campbell* v. *Mackay* (2) it was held that, in dealing with objections of this class, the Court has a wide discretion, and allows them only where real inconvenience would result from what is objected to.

The demurrer must be overruled, with leave to plead and answer in two months. Of course this will not deprive the Defendants of any rights they may have as to privilege.

Solicitors for the Plaintiff: Messrs. *Paterson, Snow, & Burney.*

Solicitors for the Defendants: Messrs. *Rooks, Kenrick, & Harston.*

(1) 6 D. M. & G. 111. (2) 1 My. & Cr. 603.

M. R.
1873
Feb. 25.

EAGLES *v.* LE BRETON.

[1861 E. 68.]

Will—Gift to "my relatives"—Time when Class to be ascertained—Joint Tenancy.

Testatrix directed all her property at the death of *A.* and *B.* "to pass to my relatives in *America*":—

Held, that the class was to be ascertained at the death of the testatrix; and that all her next of kin in *America* then living were entitled as joint tenants.

CATHARINE CHAMBERS, by her will, devised all her real estate to her sisters, *Jane Coucher* and *Anne Peppin*, absolutely, as tenants in common; and also gave to them the residue of her personal estate. By a subsequent testamentary instrument the testatrix gave the following direction: "At the death of my sisters, *Anne Peppin* and *Jane Coucher*, the residue of my property is to pass to my relatives in *America*."

Jane Coucher died in the lifetime of the testatrix. In 1857 the testatrix died, leaving *Anne Peppin* her surviving, who died in 1859.

There were thirteen persons living at the death of the testatrix who were her next of kin, and who answered the description of her "relatives in *America*." Of these one predeceased *Anne Peppin*, and several died subsequently.

The suit was instituted by the Plaintiff, the legal personal representative of the testatrix, for the administration of her estate; and the questions now submitted to the Court on further consideration, were, first, when the class of persons taking on the death of the tenant for life was to be ascertained; and, secondly, whether they took as joint tenants or tenants in common.

Mr. *Fischer*, Q.C., and Mr. *Alexander*, for the Plaintiff.

Mr. *Fry*, Q.C., Mr. *Busk*, and Mr. *C. Brown*, for other parties.

Mr. *Roxburgh*, Q.C., and Mr. *Simmonds*, for the surviving relatives of the testatrix in *America*:—

The words "my relatives" are equivalent to "next of kin,"

according to the *Statute of Distributions*. Those who were living at the death of the testatrix were entitled to take as joint tenants: *Bullock* v. *Downes* (1).

Mr. *W. Pearson*, for the legal personal representatives of one of the "relatives" of the testatrix who survived her, but predeceased the tenant for life:—

The class of persons entitled under this gift must be ascertained at the death of the testatrix, when all her relatives in *America* then living took as tenants in common. In *Lucas* v. *Brandreth* (No. 2) (2), though the words of the settlement then under consideration were held to import joint tenancy, yet your Lordship laid down, that when there was an implied reference to the *Statute of Distributions* the next of kin took as tenants in common. I submit that the same rule applies here, and that the relatives who would have taken under the *Statute of Distributions* must take according to that statute as tenants in common.

Mr. *Routh*, for the personal representative of one of the class who survived the tenant for life and afterwards died.

LORD ROMILLY, M.R., held that the class was to be determined at the death of the ~~tenant for life~~ Lucia Fry; and that the next of kin of the ~~testatrix~~ Testatrix in *America* then living were entitled as joint tenants.

Solicitors: Messrs. *Tamplin & Tayler*; Mr. *Rivolta*.

(1) 9 H. L. 1.

(2) 28 Beav. 274. 6 Jur. N.S. 945

M. R
1872
Dec. 14.

BERRY *v.* GIBBONS.

[1863 B. 329.]

Ex parte LEE.

19 Ch D 424

Practice—Proceedings in Chambers—Sale by Court—Order directing Sale by Public Auction—Sale by Private Tender.

Although, in pursuance of an order of Court directing a sale of real estate by public auction, an attempt has been made to sell by public auction and has failed, the property cannot be sold otherwise than by public auction until a proper order for the purpose has been obtained, and any prevailing practice at Chambers to the contrary is irregular.

By an order made in this cause on the 4th of August, 1869, the Plaintiff was authorized to sell certain real estate by public auction, and the property was put up for sale accordingly, but there was no bidder. Thereupon the Plaintiff applied in Chambers for leave to sell by private tender, and the Chief Clerk sanctioned this being done by making a memorandum to that effect in his book; but the matter was not brought before the Judge, nor was any order drawn up.

The property having been advertised for sale by tender, two persons sent in tenders, which, when opened by the Chief Clerk, were found to be for the same amount; and the Chief Clerk declared the property not sold. The Chief Clerk then gave notice to the parties who made the tenders for a sale by auction privately at the Chambers of the Judge. Mr. *William Lee*, one of the parties who tendered, alone attended, and was declared the purchaser.

Upon the abstract coming in, the purchaser raised various objections, one of which was that the mode of sale was not authorized by the order of the Court. These objections were not removed to the satisfaction of the purchaser, who took out a summons that he might be discharged from his contract. This summons now came on to be heard.

Mr. *Fry*, Q.C., and Mr. *A. Anderson*, for the purchaser.

Sir *R. Baggallay*, Q.C., and Mr. *Bagshawe*, for the Plaintiff,

stated that the usual practice at Chambers had been followed in the present case.

M. R. 1872 BERRY v. GIBBONS. *Ex parte* LEE.

THE MASTER OF THE ROLLS said the proceedings in Chambers had been quite irregular; an order made by the Court must be followed, and if any alteration were necessary, the matter must be brought before the Judge, and a proper order made sanctioning the alteration; that not having been done in this case, the purchaser would be discharged from his contract, and his costs must be paid out of the estate.

Solicitors: Messrs. *Lyne & Holman;* Messrs. *Palmer, Eland, & Nettleship.*

LEES *v.* LEES.

M. R. 1872 Dec. 20, 21.

[1849 R. 3.]

Practice—Administration Suit—Costs—Charge of Costs on Trust Estate—Submission to pay Costs.

The Court has no jurisdiction to charge the costs of an administration suit on any part of the estate administered, and direct a sale against the will of a person beneficially entitled, who submits to pay his share of the costs.

JOSEPH LEES, the testator in the cause, was at the time of his death entitled to an undivided moiety of the fee simple of certain real estate consisting of lands, buildings, coal mines, and other hereditaments in the counties of *Lancaster* and *York,* and to certain undivided shares of the reversion in fee of very extensive coal mines which were demised to various colliery companies in which he was interested, and also to other real estates or shares of real estates. He died in 1826, having devised his real estate to trustees upon certain trusts, under which the parties to the present suit were entitled thereto in undivided 56th shares (subject as to some of the shares to incumbrances which had been created thereon).

In 1830 a suit was instituted for the administration of the trusts of the will; and a decree was made and divers proceedings taken therein. Three suits of revivor and supplement were also instituted; and an order was made in all these suits in 1849 by which all questions relating to the personal estate of the testator were

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finally disposed of. After that date no steps were taken in the suits (which had become abated) until 1867, when the bill in the present suit was filed praying for the usual order of revivor, and also that such proceedings might be directed for the purpose of obtaining partition or sale of the several estates in which the testator held undivided shares as might seem expedient to the Court.

Upon the further consideration of the cause it was proposed to declare the costs of the suit to be a charge on the last-mentioned estates, and (with the concurrence of the parties interested in the shares not subject to the trusts of the testator's will) to take an order for the sale of the entirety of such estates.

The *Solicitor-General* (Sir *G. Jessel*), Mr. *Fry*, Q.C., and Mr. *Waller*, for the Plaintiffs:—

The Court has jurisdiction to make such an order as is asked. Before the *Partition Act* of 1868 the Court constantly made orders charging costs on real estate, and directing a sale: *Thackeray* v. *Parker* (1); *Davis* v. *Turvey* (2); *Coventry* v. *Coventry* (3); *Fleming* v. *Armstrong* (4); *Cox* v. *Cox* (5). It may be said that all these orders were made by consent; but infants, who are incapable of consenting, were in each case interested. If the order we ask cannot be made, the only result will be the institution of a very large number of partition suits, in which orders for sale may be obtained.

Mr. *Hamilton Humphreys*, and Mr. *Oswald*, for other parties interested under the will, supported the view of the Plaintiffs.

Sir *R. Baggallay*, Q.C., and Mr. *Bardswell*, for the parties entitled to the shares not subject to the trusts of the will, submitted to be bound by the order.

Mr. *Southgate*, Q.C., and Mr. *Vaughan Hawkins*, for the remaining parties interested under the will of the testator:—

We object to a sale. Under an order made in the suit we have been let into possession of our interests. We are ready and willing

(1) 1 N. R. 567.
(2) 32 Beav. 554.
(3) 34 Beav. 572.
(4) Ibid. 109.
(5) 3 K. & J. 554.

to pay our share of the costs; and that being so, we say there is no jurisdiction to order the costs to be raised by a sale or mortgage. In all the cases cited the order was made by the consent of the adult parties to the suit. But an order could only be made for the sale of so much of the estate as would be necessary for the purpose of raising the costs; and even then the sale ought to be made with all the restrictions imposed by the *Partition Act*.

Mr. *Fry*, in reply.

Dec. 21. LORD ROMILLY, M.R.:—

I have looked at the papers in this case, and certainly an estate in a more complicated state I never met with. I am fully convinced that it is very essential that the entirety of the different properties should be sold, and that the assent of the other proprietors was a very wise thing and would lead to a very beneficial result. It is said that the value of the property, if sold as an entirety (of course there must be a great many lots), would be £175,000; whereas the value of the testator's share of it would not be more than £56,000 if it is not sold as an entirety. I think it would be very desirable to sell the entirety; and I have tried to see if I could not make an order for that purpose compulsorily, because my conviction is there are, if not more persons, at all events two, each striving to play against the other so as to get rather more than what he would be otherwise entitled to, or to give rather less than he would be otherwise bound to give. In that state of circumstances I was very desirous to see if I could not force the sale; but after looking at all the authorities I am aware of, and the course they have taken, I do not think there is any power in the Court to direct a sale compulsorily. If one of the parties disputes that it is necessary to mortgage or sell the property for the sake of costs, I doubt whether this Court ever compels that to be done. I cannot find any instance where it has been done *in invitum* against a person who offers to pay his share of such costs without compulsion; and I do not think I am entitled to make a precedent on the present occasion. All I can say is, if the parties get wiser and come to me (for of course I shall give

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liberty to apply), I will direct a sale. I cannot do it, I am satisfied, *in invitum*.

Solicitors: Messrs. *Johnson & Weatheralls;* Messrs. *Burton, Yeates, & Hart;* Messrs. *Fearon, Clabon, & Fearon.*

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Ex parte A CLERGYMAN.

33 & 34 *Vict. c.* 91—*Deed of Relinquishment by Clergyman—Inrolment—Change of Intention—Vacating Inrolment.*

A clergyman, with the view of relinquishing his office, executed a deed in the form prescribed by the statute, 33 & 34 Vict. c. 91, and caused it to be inrolled, but did not take any of the further steps required by the Act. He subsequently abandoned the intention of relinquishing his office:—

Held, that the inrolment might be vacated.

IN this case a clergyman of the Church of *England* had, with the view of relinquishing his office, executed a deed in the form prescribed by the statute, 33 & 34 Vict. c. 91, and had left the deed at the Inrolment Office for inrolment on the 28th of November, 1872, but he had not taken any of the further steps required by the Act (1). He had since abandoned the intention of relinquishing his office.

(1) The material portions of the Act are as follows:—

Sect. 3: "Any person admitted (before or after the passing of this Act) to the office of minister in the Church of *England* may, after having resigned any and every preferment held by him, do the following things:—

(1.) He may execute a deed of relinquishment in the form given in the second schedule to this Act;

(2.) He may cause the same to be inrolled in the High Court of Chancery;

(3.) He may deliver an office copy of the inrolment to the bishop of the diocese in which he last held a preferment, or if he has not held any preferment then to the bishop of the diocese in which he is resident, in either case stating his place of residence;

(4.) He may give notice of his having so done to the archbishop of the province in which that diocese is situate."

Sect. 4: "At the expiration of six months after an office copy of the inrolment of a deed of relinquishment has been so delivered to a bishop, he or his successor in office shall, on the application of the person executing the deed, cause the deed to be recorded in the registry of the diocese, and there-

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Mr. *Roxburgh*, Q.C., now applied *ex parte* on his behalf that the inrolment might be vacated. He submitted that neither the execution of the deed nor the inrolment had of themselves any legal effect; before any effect could be produced in law further steps must be taken; a copy of the inrolment must be delivered to the bishop; six months must be allowed to elapse; the clergyman must then apply to the bishop to have the deed recorded, and when this was done, and "not sooner," the clergyman became incapable of officiating or holding preferment. Here the clergyman had changed his mind; he was no longer desirous of relinquishing his office, and, never having ceased to be a clergyman in the eye of the law, he wished that evidence of his abandoned intentions might not be preserved on record against him.

LORD ROMILLY, M.R., said that the application was entirely novel. A clergyman proposing to avail himself of the provisions of the recent Act had executed a deed, and had caused it to be inrolled, then he had stopped short, not because of any mistake or fraud, but simply because he had changed his mind, and he now applied to have the inrolment vacated. As this was the first case of the kind, and the application came upon His Lordship somewhat by surprise, he would take time to consider it.

1873. Jan. 11. LORD ROMILLY, M.R.:—

I have thought over this case, and am of opinion that this gentleman has not gone too far, and that I can allow the inrolment to be vacated. I must, however, express my surprise that the Act is not more explicit on the subject.

Solicitors: Messrs. *Emmets & Co.*

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upon and thenceforth (but not sooner) the following consequences shall ensue with respect to the person executing the deed:—

(1.) He shall be incapable of officiating or acting in any manner as a minister of the Church of *England*, and of taking or holding any preferment therein, and shall cease to enjoy all rights, privileges, advantages, and exemptions attached to the office of minister in the Church of *England*."

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Jan. 25, 27.

In re WINTER.

Land Registry—Registration subject to Mortgage—Sale by Mortgagee—Removal from Register—Land Transfer Act (25 & 26 *Vict. c.* 53), *s.* 34.

Where the owner of an equity of redemption of real estate is entered on the register of estates with an indefeasible title, subject to a mortgage, and the mortgagee afterwards exercises his power of sale, and conveys part of the registered property to a purchaser, such purchaser is entitled, after his conveyance has been entered on the register, to have the property bought by him, and all entries relating thereto removed from the register without the consent of the mortgagor.

THIS was an application, under the *Land Transfer Act* (25 & 26 Vict. c. 53), s. 34 (1), that certain hereditaments comprised in a conveyance dated the 3rd of December, 1868, and all entries relating thereto, might be removed from the Land Register.

On the 25th of February, 1868, *Isabella Pope*, described as the sole acting trustee named in the will of *Thomas Pope*, dated the 17th of August, 1860, proved by her in the principal Registry of the Court of Probate on the 10th of September, 1867, was placed on the Register of Estates with an indefeasible title, as being entitled to certain hereditaments, known as the *St. Helen's Park* estate, in fee simple in possession, upon the trusts and with the powers contained in the said will relating to the real estate comprised in the general devise therein contained, or such of the same trusts and powers as were subsisting and capable of taking effect, subject, however, to a mortgage dated the 5th of March, 1864, and certain subsequent deeds of further charge entered on the Register of Mortgages and Incumbrances.

By a deed, dated the 9th of July, 1868, the mortgage and further charges were assigned to one *Edwin Newman* the younger, who, in exercise of the power of sale contained in the mortgage, sold part of the *St. Helen's* estate to *Henry Winter*, and by the said conveyance of the 3rd of December, 1868, conveyed the pro-

(1) This section is as follows:—

"The registered proprietor of land may, with the consent of all persons appearing by the register to be interested in such land, remove the same from the register, and thereupon the register shall, as regards such land, be deemed to be closed."

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perty so sold to him. This conveyance was entered on the record of titles to lands on the register as follows:—

"By deed dated the 3rd of December, 1868, such part of the hereditaments as is edged with yellow dotted lines and lettered S. in yellow on the deposited map, No. 339, was, in consideration of £230 paid by *Henry Winter*, of *Hastings*, *Sussex*, printer, to *Edwin Newman* the younger, expressed to be granted by the said *Edwin Newman* the younger, therein described as mortgagee in fee with power of sale, in exercise of the said power, to the use of the said *Henry Winter*, his heirs and assigns, together also with the use of the roads on the *St. Helen's Park* estate discharged from the mortgage securities under which the said *Edwin Newman* claims respectively."

Henry Winter applied to have the property so conveyed to him removed from the register; but the Registrar was of opinion that this could not be done without the consent of the persons entitled under the will of *Thomas Pope* (1).

(1) The following is the statement by the Registrar of the reasons for his refusal:—

"This is an application to remove a part of the registered property from the register under the 34th section of the Act. And the question to be decided is, whether the person applying to take this part of the property off the register is a "registered proprietor" within the term of the Act, and if so, whether he can remove this portion of the property from the register without the consent of the persons who placed it on the register, viz., the persons entitled under the will of *Pope*.

"The Registrar thinks, and has so informed the applicant, that if the persons now interested under *Pope's* will consent, this part of the property might be removed, but that he cannot safely do it without such consent.

"It will be seen from the dates that the mortgages are all *prior* to the registration. The Act gives the office no power to inquire into the title to a mortgage made prior to the registration; the registration is of the title of the mortgagor subject to the mortgage; no inquiry can be or is made on the registration as to any dealings with the mortgage which might have been assigned without the knowledge of the mortgagor; nor is there any constat before the office of the state of the mortgage as between the mortgagor and mortgagee at the time of the exercise of the power of sale. The power might have been properly or improperly exercised so far as the office knows, and consequently the entry of the purchaser's title is merely of his conveyance—*valeat quantum* (see the form of the entry).

"In the case of a mortgage made *subsequently* to the registration, in which case the mortgagee would take the statutable title, and all the dealings with the mortgage would be or ought to be entered on the register, it was decided in *In re Richardson* (Law Rep. 12 Eq. 398) that the purchaser took an indefeasible title, but that decision does not seem to cover this case."

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The question was now brought before the Court on an adjourned summons.

Mr. *Freeman*, in support of the application:—

The mortgage under which *Newman* claims is admitted to be valid. It may be that the power of sale has been improperly exercised; but if so, the rights of the parties interested under the will of *Thomas Pope* will not be affected by the removal of the property from the register. The case of *In re Richardson* (1) really goes further than is sought by the present application.

Jan. 27. LORD ROMILLY, M.R.:—

I think you are entitled to the order.

Solicitor: Mr. *J. H. Lydall.*

(1) Law Rep. 12 Eq. 398.

CORPORATION OF FOLKESTONE *v.* WOODWARD.

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Nov. 7, 14.

[1872 F. 90.]

Church—Building—Owner—Local Improvement Act—Line of Building—Setting back Houses—Delay in exercising Powers.

The Corporation of *Folkestone* had power, under the *Folkestone Improvement Act*, 1855, to prescribe the line in which any house to be thereafter built or taken down for the purpose of being rebuilt or altered should be erected, on payment of compensation to the owner of any house required to be set back, and it was also provided that no new street to be thereafter laid out should be of less width than forty feet, inclusive of footways, and in the case of existing streets, houses to be thereafter erected were to be set back so as to allow of a width of forty feet:—

Held, that a church was a house, and a perpetual curate in whom the freehold of the site was vested under 43 Geo. 3, c. 108, an owner within the meaning of the Act.

A temporary church fronting to a road within the borough less than forty feet wide having been pulled down with a view to erecting a permanent church, the Corporation gave notice to the clergyman in charge at the time, of a resolution passed by them that the road on which the church abutted must be not less than forty feet wide; but there was no statement that the additional width was to be gained on the side on which the church abutted, and it appeared that the street might have been widened on the side opposite without removing any buildings.

Afterwards, but not till the foundations of the new church had been put in, the Corporation prescribed a line of building which came within the limits of the church as designed:—

Held, that they were too late, and could not restrain the erection of the church in the manner in which it had been commenced.

THIS was a motion for an injunction to restrain the Defendant, who was the perpetual curate of the parish of *Folkestone*, from building a church in such a manner as to reduce a street, called the *Dover Road*, to a less width than forty feet, the Corporation offering to pay to the Defendant any loss or damage he might sustain in consequence of not being able to build up to the full extent of his land.

The Plaintiffs, the Corporation of *Folkestone*, had, under the *Folkestone Improvement Act*, 1855, certain general powers of regulating the width of streets and controlling the mode of construction

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of any new buildings in the borough. The Act contained the following provisions :—

"28. This Act shall be executed by the Corporation acting pursuant to the powers and provisions of the *Municipal Corporation Acts*."

"48. The *Towns Improvement Clauses Act*, 1847" (except clauses 50 and 103, and the proviso to clause 107), "shall be incorporated with the Act."

"50. In every case where the width of any street shall not be forty feet, it shall be lawful for the Corporation, whenever it shall appear to them expedient, to prescribe the line in which any house to be hereafter built or taken down for the purpose of being rebuilt or altered, shall be erected, and the same shall be erected in accordance therewith, and the Corporation shall pay or tender compensation to the owner or other person immediately interested in such house for any loss or damage he may sustain in consequence of his house being set back, the amount of such compensation, in case of dispute, to be settled in the same manner as compensation for lands to be taken under the provisions of this Act is directed to be settled."

"69. No new street to be hereafter laid out shall be of less width than forty feet, inclusive of the footway, and in case of any existing street, or of any part of such street not being of the before-mentioned width, and not being built upon on either side, or only on one side thereof, the houses to be hereafter erected on any part of any such street shall be so set back as to allow of the street being widened to the before-mentioned extent of forty feet: Provided always, that the Corporation shall make full compensation to the owner of the land upon which any such house is to be so set back for any damage he may thereby sustain."

The Corporation were also the urban sanitary authority within the district of the borough of *Folkestone* under the *Public Health Act*, 1872.

By an indenture of the 10th of July, 1865, a piece of land, triangular in shape, and bounded on three sides by streets, none of which were as much as forty feet in width, was vested in the Defendant and his successors, under the provisions of 43 Geo. 3, c. 108, as the site of a church or chapel to be erected thereon, and

for ever thereafter used as a church or chapel for the parishioners of the parish of *Folkestone*. Shortly after the date of the deed the Defendant erected on part of the land a temporary wooden building, which was from that time used as a church till April, 1872, when he was in a position to build a permanent church, for which plans were accordingly prepared.

On the 22nd of April, 1872, a plan, said to be a mere rough sketch, but shewing the proposed means of ventilation, was, in accordance with sect. 110 of the *Towns Improvement Clauses Act*, 1847, submitted to the Corporation, who passed the following resolution:—

"Resolved, that the town clerk be instructed to signify to Mr. *G. F. Bodley*, architect, the approval of this committee of the plan submitted by him in pursuance of the 110th section of the *Towns Improvement Clauses Act*, 1847, shewing the manner proposed for the construction of *St. Michael's Church* with respect to the means for supplying fresh air, and the general mode of ventilation of such church."

The town clerk accordingly signified the approval of the Plaintiffs to Mr. *Bodley*.

In May or June, 1872, the temporary church was pulled down. On the 17th of June the corporation passed the following resolution:—

"That the width of the several roads upon which the proposed new church of *St. Michael* will abut must be of not less width than forty feet, inclusive of footways;" and the resolution was brought to the knowledge of the clergyman who was then acting for the Defendant as minister in charge of the church.

The Defendant then commenced putting in the foundations of the permanent church. It was entirely within the land conveyed to him, but occupied rather more ground than the temporary church had done, and was so placed as not to leave room for the enlargement of the *Dover Road* to the full width of forty feet by widening it on that side. It was stated, however, that exactly opposite to the church there were no buildings, and it would be possible to gain the required extension by taking a small portion of the playground of a school.

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On the 22nd of July a meeting of the Corporation was held at which the Defendant was present, and the question of the mode of building the church was discussed. Some further negotiations took place, in the course of which proposals were made for altering the position of the church so as to leave a clear space of forty feet for the roads round it, but no agreement was come to.

On the 5th of August, 1872, the Corporation prescribed the line of building for any building thereafter built, or taken down for the purpose of being rebuilt or altered, on the *Dover Road* frontage, and on the 6th of August they sent a plan to the Defendant shewing the prescribed line so far as it affected his property. It comprised a portion of the site of the new church.

The building appeared to have been stopped for a time during the negotiations, but on the 21st the Defendant wrote to the Corporation to the effect that he had obtained the opinion of counsel in favour of his right to build the church in any position he thought fit.

The bill was filed on the 3rd of October, 1872, and an interim order obtained, and on the 7th of November, on the present motion being opened, the Vice-Chancellor directed that an intimation should be given to the Corporation of his opinion that they might with great propriety, without waiving their strict legal rights, consent to the building being erected as proposed by the Defendant. The corporation, however, did not accede to the suggestion, and the motion now came on.

Mr. *Fooks*, Q.C., and Mr. *Ince*, for the Plaintiffs:—

The Corporation having determined to put their Act in force with respect to prescribing the width of the *Dover Road*, are bound to carry it out, and the building having been pulled down which previously existed on this plot of ground, they have no option left as to whether they will allow the new church to come within the prescribed limits.

It will perhaps be objected that a church is not such a house as was contemplated by the Act, but the word "building" would certainly include a church; and where similar provisions are contained in public Acts—as, for instance, the Act of 10 & 11 Vict. c. 34, ss. 74 & 75—houses and buildings are used as synonymous terms.

The corporation might also exercise the powers conferred by sects. 34 & 35 of 21 & 22 Vict. c. 98, under which a church would beyond question be included. If the balance of convenience or inconvenience is to be considered, that of the public must outweigh the mere alteration in the foundations of the church, especially as the Corporation offer to make compensation for any damage done.

Mr. *Glasse*, Q.C., and Mr. *Bedwell*, for the Defendant:—

This is a question of statutory jurisdiction, and the Corporation cannot go beyond their powers: *Frewin* v. *Lewis* (1). They rely upon sect. 50 of the *Folkestone Improvement Act*, 1855. A church is not within the provisions of that section, and no one can be the owner of a church in the sense in which the word is there used: *Angell* v. *Vestry of Paddington* (2). There is in fact no person to be compensated as owner. A church is not made a house within the provisions of the Act merely by being called in the bill a house to be used as a church.

Then the action of the Corporation came too late. There was nothing in the notice that *Dover Road* was to be forty feet wide to lead to the inference that the church was to be set back, because the street might have been widened on the opposite side, and it was too late after the foundations of the church had been put in to prescribe the line of building.

Under the circumstances, if the Court has a discretion, it will not exercise it in favour of the Plaintiffs.

Mr. *Fooks*, was only called on to reply on the question whether the Corporation were in time in prescribing the line of building.

SIR R. MALINS, V.C.:—

The questions raised by this motion are of very considerable public importance. In the year 1865 a piece of land was voluntarily and formally conveyed to Mr. *Woodward*, who was then and is still perpetual curate of *Folkestone*, as the site of a church which was then to be erected.

It appears that shortly afterwards a temporary building was

(1) 4 My. & Cr. 249. (2) Law Rep. 3 Q. B. 714.

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erected, and from that time was used as a church till the spring of this year, when it was resolved to take it down and to erect upon the site a permanent substantial church. This church abuts on the one side upon the *Dover Road*, and on the other side on other streets. The only point now in contest relates to the *Dover Road*.

The Corporation of *Folkestone* are the governing body in this matter for applying the Acts of Parliament for public health and public improvement, under which they have very considerable powers. Various sections of the Acts of Parliament have been referred to in argument; and it has been conceded that the governing body have the power of prescribing the line of a new building.

Mr. *Glasse*, and Mr. *Bedwell*, have argued that although those powers may apply in general, they do not apply to a church. But if they are right in the construction of the Acts of Parliament in that respect, the consequence would be that wherever a church is to be erected the Corporation or the governing body have no control over it, and the owner of the land may build to its full extent, although that may have the effect of absolutely obstructing the public traffic.

It is impossible that this can be the meaning of the Legislature. And although the Acts of Parliament are in several respects defectively worded, and give a definition of a house not in terms covering and including a church, yet even if it were necessary to come to a conclusion upon the Act of the 11 & 12 Vict. c. 63, I should be obliged to decide that a church is a building within the meaning of the Act. Mr. *Ince* cited an Act which I think is conclusive upon the subject, 21 & 22 Vict. c. 98, which is made part of the former Act, and by sect. 35 enacts that when any house or building has been taken down in order to be rebuilt or altered, the Local Board may prescribe the line in which any house or building to be thereafter built shall be erected, and then provides for the payment of compensation for setting back any house or building.

It was argued, with reference to a person about to build a church, who in the present case is Mr. *Woodward*, that neither he nor anybody associated with him was the owner of the land; and in

support of this argument the case of *Angell* v. *Vestry of Paddington* (1) was relied upon. That case decides that those who represent the church are not owners so as to be liable to pay taxes or rates, and, in my opinion, has no bearing on a case like this, where the object of the Act is to have all new streets of a certain width for the purposes of public health and convenience. I come, therefore, to the conclusion that upon the old Act, as well as that of 21 & 22 Vict. c. 98, a church is a building within the provisions of these Acts of Parliament.

The Corporation then have recourse to the *Folkestone Improvement Act*, 1855.

[His Honour then read the 69th section of that Act and the resolution of the Corporation of the 17th of June, 1872, and continued:—]

I rather infer from the meetings which subsequently took place that Mr. *Woodward* must have entertained the idea that the corporation would probably take part of his land; but they never gave him notice of their intention to prescribe the line within which buildings should not be erected, and they did not at that time prescribe any line. There is no evidence to shew that there was not abundant power and means of having a road forty feet in width without in the slightest degree touching Mr. *Woodward's* land; and, in answer to a question I asked, it appeared that, if Mr. *Woodward* were to build up to the extreme limit of his land, there would still be plenty of means of making a road forty feet in width at this particular place, because upon the opposite side of the road to the church there are no buildings.

Now the new church is not built exactly upon the site of the old church, because it is to project two feet further towards the *Dover Road*, but it is entirely within the Defendant's land. Some meetings are relied upon as giving him information that he is not to build up to the limits of his own land, but he is, at all events, not told how much short of the extremity of his land his building is to be placed, and it is not till afterwards that the Corporation lay out the line of building under the powers with which they are armed. I have already intimated my opinion, and I

(1) Law Rep. 3 Q. B. 714.

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repeat that where powers such as those of prescribing the width of streets are vested in Corporations the Court has no right to control the exercise of those powers unless they are corruptly or fraudulently used. Now what powers have they? [His Honour then read the 50th section of the *Folkestone Improvement Act*, 1855, and continued:—] I assume what, as far as I can see is the case, that the Corporation are acting conscientiously in the matter, that is, fairly and honestly, to the best of their judgment; but I am bound to say that they appear to me to take an extreme view of the necessity of the case, because the Act only directs the line to be laid out "if it shall appear to them expedient."

[His Honour then referred to the reconsideration of their position by the Corporation at his suggestion, and certain modifications they had made in their plans in consequence, and to the facts bearing on the question of the requisite width of the streets, and continued:—]

I think they might very well have refrained from laying down the line in the way they have done, but they had the right to do so. It is what they deem expedient that has to be complied with. But where the Corporation insist, as in my opinion they do, upon an extreme exercise of their powers, that is very good ground for saying that they should be themselves treated strictly.

They determined on the 17th of June that the width of the road should be forty feet; but they did not then exercise their Parliamentary power of laying out the line and tell Mr. *Woodward* that there was a strip of his land on which he must not build. Although there were negotiations going on until the time that they laid down the line of building, and thereby prohibited any building beyond that line, I take it that, either as a private individual or the representative of the church, Mr. *Woodward* was up to that time at liberty to go on building on every inch of his own land, and was committing no wrong by doing so. They must act in proper time, and if they are not vigilant they must take the consequences. Upon the evidence, I am bound to assume that the foundations were laid, and the building had made considerable way, on the 5th of August, when, for the first time, the line was prescribed. Mr. *Fooks* urged in his reply that the Corporation might lay down the line whenever, in point of time, they thought

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fit; but the Act only means that they may do so in any case they think fit. They are not to allow the landowner to erect the building, and then to lay down the line.

Therefore, thinking that the Corporation are unnecessarily vigilant for what they call the public interests, and are unreasonably exercising the powers vested in them, though I cannot for that reason interfere with them, yet they, on the other hand, must be treated strictly, and they come too late. The motion for the injunction must accordingly be refused.

Solicitors: Messrs. *Talbot & Tasker;* Messrs. *Tanqueray-Willaume & Hanbury.*

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PUDSEY COAL GAS COMPANY *v.* CORPORATION OF BRADFORD.

[1872 P. 192.]

Gas Company—Municipal Corporation—Limit of Powers—Injury to Private Individual—Right to maintain a Suit.

A municipal corporation having, under the provisions of an Act of Parliament, bought up a gas company which previously supplied gas to the borough, and which had compulsory powers for the purpose within the borough, commenced supplying gas to an adjoining township, in which another gas company already existed having similar powers, within the township. The gas company of the township having filed a bill against the corporation to restrain them from supplying gas within the township, and alleging, as a personal injury which entitled them to maintain their suit, that the corporation had contracted to supply gas to a particular manufactory within the township which otherwise they must have supplied, and that they had thereby been deprived of the profits arising from the supply of gas to the manufactory, and that great loss would be sustained by them:—

Held, on demurrer, that the injury alleged was not such as entitled the Plaintiffs to maintain the suit.

DEMURRER.

This was a bill by the *Pudsey Coal Gas Company*, incorporated by the *Pudsey Gas Act*, 1855, for the purpose of providing gas within certain limits therein specified. And it was by the same Act enacted that the limits within which the Act might be put in force by the company should be the townships of *Pudsey* and

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PUDSEY COAL GAS COMPANY v. CORPORATION OF BRADFORD.

Calverley-cum-Farsley, in the parish of *Calverley*, in the West Riding of the county of *York*.

The township of *Pudsey* adjoins the borough of *Bradford*. The Defendants were the Corporation of *Bradford*, and, by the *Bradford Corporation Gas and Improvement Act*, 1871, were authorized to purchase the undertaking, works, and property of the *Bradford Gaslight Company*, which was a company originally formed under an Act of 3 Geo. 4, the powers of which were subsequently extended by an Act of 8 Vict. By the former of these Acts the company was established for the purpose of producing gas for lighting the town of *Bradford* and the townships of *Manningham*, *Horton*, and *Bowling*, within the parish of *Bradford*; and they were empowered to contract for the lighting with gas the town, townships, and parish, any or either of them, or any public streets, squares, highways, market-places, courts, yards, passages, lanes, private houses, shops, inns, taverns, counting-houses, warehouses, and public works and manufactories and other buildings, of whatever denomination the same might be, or any of them, within the said town, townships, and parish, any or either of them respectively. The company was further empowered to erect works and to break up streets, lay pipes, and do similar acts along such places as aforesaid, and in such manner as should be necessary for carrying the Act into execution. But it was enacted, that nothing in the Act should extend to authorize or empower the company, or any of their officers, agents, or servants, to break up the soil or pavement of all or any part of any of the public streets, squares, market-places, highways, or other public places in the said town, townships, and parish, which then were or thereafter might be maintained and supported in repair by and under the control and direction of any surveyors of highways or other person, or any commissioners or trustees under any Act of Parliament, without having first obtained their consent.

By the *Bradford Corporation Gas and Improvement Act*, 1871, it was enacted that all the statutory and other rights, powers, privileges, and authorities by or under any Act conferred or given to or vested in the company should apply to and be vested in the corporation, as if they had been originally named therein. And it was also enacted that the corporation might make, store, and

supply gas within the borough, and within any place within the limits for the supply of gas by the company; and the corporation were also empowered to alter and extend the gasworks, and to do all such acts as they should think proper for making or storing gas, and for supplying gas within the limits.

The bill alleged that, under the Act of 1871, the corporation had purchased, and were then the owners of, the undertaking and works of the *Bradford Gaslight Company;* and that they were by the three Acts empowered to supply and sell gas within the limits of the said Acts, but not further or otherwise.

It then stated that the corporation had within the last ten days taken measures for the supply of gas to buildings, manufactories, and houses beyond the limits of the said three Acts, and within the limits within which the Plaintiffs were authorized to supply and contract for the supply of gas; and a certain road in the township of *Pudsey* was mentioned, in which they were preparing to supply gas.

It was then alleged, in paragraph 13 of the bill, that a certain manufacturer had lately erected a large mill and premises wholly outside the corporation boundary and within the township of *Pudsey,* which the Plaintiffs were ready, able, and willing to supply with gas, and which would have been supplied with gas by them but for the intervention of the corporation, who had entered into negotiations with the manufacturer in question for the supply of gas to the same mill and premises; and that the corporation were about to contract for the supply of gas to the same mill and premises, and intended to supply the same with gas accordingly.

Paragraph 14 was as follows:—

"The said acts of the corporation are wholly unauthorized by the Acts of Parliament under which they derive authority to manufacture and supply or sell gas, and by which unauthorized acts the Plaintiffs will be deprived of the profits arising from the sale of gas to the said manufacturer's houses and buildings illegally supplied or about to be supplied by the corporation, and great loss will be sustained by the Plaintiffs if the said illegal acts of the corporation are permitted to continue."

The bill prayed a declaration that the corporation were not

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entitled to supply gas outside their limits, and an injunction to restrain them from supplying gas within the limits of the *Pudsey Gas Act*, 1855.

Mr. *Cotton*, Q.C., and Mr. *Cracknall*, for the demurrer :—

The Plaintiffs have no monopoly for the supply of gas to the township of *Pudsey*, and the Defendants, or any other parties, have a perfect right to supply gas there if they can do so without creating a nuisance or finding it necessary to put in force their Parliamentary powers. No Act of Parliament is required to enable persons to sell gas; and even when they have Parliamentary powers extending over a district, they are not restricted to supplying gas within those limits: *Attorney-General* v. *Sheffield Gas Consumers Company* (1); *Attorney-General* v. *Cambridge Consumers Gas Company* (2). Even in the metropolitan district, where there is a monopoly, it does not affect any parties except the companies amongst whom the monopoly is distributed: *Imperial Gaslight and Coke Company* v. *West London Junction Gas Company* (3). The *Bradford Gas Company* had consequently a clear right to sell gas in *Pudsey*, and it can hardly be said that the corporation, who have bought up the company, have less power.

Mr. *Glasse*, Q.C., and Mr. *Freeling*, for the Plaintiffs:—

The equity of this bill is, that a municipal corporation cannot do anything beyond the district to which its powers are limited by the Act under which it was constituted. And if in so acting it injuriously affects an individual, the party injured has a right to apply to the Court as an individual to stop the acts complained of, and it is not necessary that the suit should take the form of an information. Bearing this in mind, it is obvious that the cases cited on behalf of the Defendants have nothing to do with the present case.

The case which most resembles the present is *Stockport District Waterworks Company* v. *Corporation of Manchester* (4), and the demurrer was only allowed then on the ground that no sufficient private injury was shewn to allow the Plaintiffs to maintain the

(1) 3 D. M. & G. 304.
(2) Law Rep. 4 Ch. 71; 6 Eq. 282.
(3) 14 W. R. 1019.
(4) 9 Jur. (N.S.) 266.

suit as individuals. Here a distinct injury is alleged, and the case is an authority in support of the bill. The bill does not allege on behalf of the Plaintiffs any exclusive right to sell gas in *Pudsey*. It simply restricts the corporation to the limits in which they have their powers.

Mr. *Cotton*, in reply:—

There is nothing in the nature of a municipal corporation which restricts its working to the municipal boundaries. As to the injury alleged, it is merely the competition of a rival trading company, which can hardly be sufficient. There was, in fact, an allegation of a similar injury in *Stockport District Waterworks Company* v. *Corporation of Manchester* (1).

SIR R. MALINS, V.C.:—

This is a demurrer by the mayor, aldermen, and burgesses of the borough of *Bradford* to a bill filed against them by the *Pudsey Coal Gas Company*. The prayer of the bill asks for a declaration that the Defendants, the corporation, are not entitled to supply gas to any street, building, or place which is not within the limits of their Parliamentary boundary, and for an injunction to restrain them from supplying gas beyond those limits.

It appears from the allegations of the bill that the township of *Pudsey* is immediately contiguous to the borough of *Bradford*, and that the corporation of *Bradford* have had transferred to them, under the authority of the *Bradford Corporation Gas and Improvement Act*, 1871, the rights of the *Bradford Gaslight Company*, which included compulsory powers to break up streets, and to lay down pipes, and to do other acts for the purpose of enabling them to supply gas to the town of *Bradford* and some adjoining districts. It appears that no part of the township of *Pudsey* was within the borough of *Bradford*, or within the limits to which the *Bradford Gaslight Company's* Acts applied. Under two other Acts of Parliament the Plaintiffs had similar compulsory powers with respect to the township of *Pudsey*. By one of them, the *Pudsey Gas Act*, 1855, the limits were prescribed within which it might be put in

(1) 9 Jur. (N.S.) 266.

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force, and the corporation had, under their Act, only the same powers as had previously belonged to the *Bradford Gaslight Company.*

It is, therefore, perfectly clear that the Parliamentary powers of the *Bradford* corporation were limited to the borough of *Bradford* and certain specified adjoining places, and those of the Plaintiffs were limited to the township of *Pudsey* and certain other adjoining localities. The argument on the part of the Plaintiffs is, that the *Bradford* corporation are a body existing for certain special purposes, and that beyond duties belonging to those purposes they have no right to do anything; and that, as regards the supply of gas, they have no right to go beyond their statutory limits. There is much to be said for this view. I am very much inclined to think that, on principle, I should have come to the same conclusion. But I think that the question has been already determined.

I think it is quite clear that a gas company have no right to do anything which would amount to a nuisance, except where they have Parliamentary powers; but there is nothing to prevent them supplying gas just as they like, if they can do so without causing any inconvenience. I consider, therefore, that *Attorney-General* v. *Cambridge Consumers Gas Company* (1), and the cases like it, have very little to do with the present question. But the case which has most bearing on the present case is *Stockport District Waterworks Company* v. *Corporation of Manchester* (2), and it seems to be entirely against the Plaintiffs. The Plaintiffs in that case were a company having power to take water from a particular river for the supply of a particular district, and the Defendants, the corporation of *Manchester*, had allowed the other Defendants, who were called the *Stockport Waterworks Company*, to effect a junction with their pipes, and so draw water for the supply of part of the Plaintiffs' district. The Plaintiffs then filed a bill against the corporation and the *Stockport Waterworks Company* for an injunction to restrain them supplying water in this way. A demurrer was filed and was allowed by the Vice-Chancellor before whom the case came, and the case went on appeal before Lord *Westbury*, who laid down the rule that an incorporated company has only such powers as have been conferred upon it. But the demurrer having been filed, the question was

(1) Law Rep. 4 Ch. 71; 6 Eq. 282. (2) 9 Jur. (N.S.) 266.

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whether it was to be allowed or overruled. The Vice-Chancellor had allowed the demurrer, and the Lord Chancellor, though he was of opinion that the corporation had no right to do what the bill alleged them to have done, considered that there was no allegation of private right which entitled the Plaintiffs to maintain the suit.

But in that case there was, in effect, the same allegation of private injury as in the present, because I find that the bill alleged that it was not within the powers of the corporation to furnish the water for the supply of *Stockport* and other towns, and that the just rights of the Plaintiffs would be seriously prejudiced and injured.

I am of opinion that the allegation in the 14th paragraph of the bill, that "great loss will be sustained by the Plaintiffs if the said illegal acts of the corporation are permitted to continue," is not such an allegation of a private injury as this Court will allow as the foundation for a bill. I am unable to see that this case can be distinguished from *Stockport District Waterworks Company* v. *Corporation of Manchester* (1). I must, therefore, allow the demurrer.

Solicitors: Messrs. *Torr, Janeway, Tagart, & Janeway;* Mr. *John Cann.*

VAUGHAN *v.* MARQUIS OF HEADFORT. COCKBURN *v.* MARQUIS OF HEADFORT.

V.-C. M. 1873 *Jan.* 22.

Fund in Court—Transfer to Court of Chancery in Ireland—Form of Order.

Where a fund in Court in a cause or matter is required to be transferred to the Court of Chancery in *Ireland*, the proper form of order is to direct that it be transferred to the Accountant-General of the Court of Chancery in *Ireland*, to be by him forthwith transferred into his name as such Accountant-General to the credit of the cause or matter to which it is required to be transferred.

THIS was a Petition for the transfer to the Court of Chancery in *Ireland* of a sum of £7693 11*s.* 7*d.* consols and £217 19s. 11*d.* cash standing to the credit of these causes, in pursuance of an

(1) 9 Jur. (N.S.) 267.

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order of the Lord Chancellor of *Ireland*, sitting in Lunacy, "In the matter of *Mary Juliana Taylour*, spinster, commonly called the Lady *Mary Juliana Taylour*, a person of unsound mind."

The prayer of the Petition was framed in accordance with *Re Lord Massereene's Policy Fund* (1), and asked that the fund might be transferred into the names of the broker of the Accountant-General of the High Court of Chancery in *England* and of the broker of the Accountant-General of the High Court of Chancery in *Ireland*, to be by them forthwith transferred into the name of the Accountant-General of the High Court of Chancery in *Ireland* to the credit of the above-mentioned matter.

The Petition was heard on the 6th of December, 1872, and an order made in accordance with the prayer.

When the order came to be drawn up it appeared that the order actually made in *Re Lord Massereene's Policy Fund* was not in accordance with that mentioned in the report of the case. The Registrar accordingly drew up minutes of an order directing that the £7693 11*s.* 7*d.* should be transferred "into the name of *Maziere John Brady*, Esq., the Accountant-General of the High Court of Chancery in *Ireland*, to be by him forthwith transferred into his name as the Accountant-General of the High Court of Chancery in *Ireland* to the credit of 'In the matter of *Mary Juliana Taylour*, a person of unsound mind.'"

Mr. *Decimus Sturges* now asked that the order might be drawn up in accordance with these minutes.

SIR R. MALINS, V.C., ordered accordingly.

Solicitors: Messrs. *Young, Jones, Roberts, & Hale.*

(1) 12 W. R. 1095.

STEAD *v.* HARDAKER.

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[1870 S. 75.]

Payment of Testator's Debts—Specifically Devised and Descended Estates.

A testator gave all and every part of his real and personal property to his executors and trustees, to be disposed of by them according to the directions contained in his will. He directed his executors and trustees, as soon as possible after his death, to pay all his debts, funeral and testamentary expenses; he then gave all his personal estate to his brother absolutely, and he devised specifically various freehold estates, leaving other freehold estates undisposed of, which descended to his heir. The personal estate was insufficient for payment of his debts:—

Held, that the specifically devised estates and the descended estates were liable rateably to the payment of debts.

THIS was a suit to administer the estate of *Wm. Stead*, who made his will on the 11th of February, 1865, in these terms: "I give to my executors and trustees hereinafter named, upon trust to their executors, administrators, heirs, and assigns, and the survivors or survivor of them, all and every part of my real and personal property, to be disposed of by them according to my directions contained in this my will. I will and direct that, as soon as possible after my death, my executors and trustees pay all my just debts and funeral and testamentary expenses. I give and bequeath all my personal property to my brother, *Michael Stead*, for his own separate use and purpose for ever." The testator then devised specifically various freehold estates to the different persons therein named, but made no residuary devise of his property. The testator died seised of or entitled to considerable real estate, both freehold and copyhold, other than that specifically devised by his will, and he died possessed of considerable personal estate. He died without issue, and *Michael Stead*, his only brother, was his heir-at-law and customary heir. The personal estate of the testator was insufficient for payment of his debts and funeral expenses, and a question was now raised as to the order in which the devised and descended real estates were applicable to payment of the debts.

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Mr. *Cotton*, Q.C., and Mr. *Everitt*, for the heir-at-law:—

We contend, in this case, that the estates which descended to the heir-at-law and the specifically devised real estates must bear the testator's debts rateably between them. This was the decision in *Ryves* v. *Ryves* (1). The same principle was laid down in *Fisher* v. *Fisher* (2), and was followed by *Wood* v. *Ordish* (3) and *Peacock* v. *Peacock* (4).

The whole of the testator's real and personal estate is given upon trust, in the first place, for payment of debts, and consequently no part of the estates, either specifically devised or descended, can be exonerated from the payments of debts.

Mr. *Harvey*, for one of the executors, who was also a specific legatee:—

The cases which have been cited are cases of lapsed legacies, and are therefore of a different nature from this, where the real estates are undisposed of and descend to the heir-at-law. This is simply a devise charging the lands with the payment of debts, and then there are specifically devised estates. The testator must have known that he had not disposed of the beneficial interest in considerable freehold estate left on his death, and must have intended all the undisposed of real estate to bear the debts in exoneration of the specifically devised estates.

Mr. *Millar*, for other specific legatees:—

This is not a devise in trust for the payment of debts, but only a charge of debts upon the estate, which must be subject to the general rule, that descended real estate shall be exhausted for the payment of debts before having recourse to specifically devised estates. The rule is laid down in *Manning* v. *Spooner* (5), where the Master of the Rolls said: "There are four classes of estates to be applied to the debts; first, the general personal estate, unless expressly exempted; secondly, any estate particularly devised for the purpose, and only for the purpose, of paying debts; thirdly, estates descended; fourthly, estates specifically devised." This case followed

(1) Law Rep. 11 Eq. 539.
(2) 2 Keen, 610.
(3) 3 Sm. & Giff. 125.
(4) 34 L. J. (Ch.) 315.
(5) 3 Ves. 114.

Davies v. *Topp* (1). Under these rules the descended estates are liable to debts before the specifically devised estates. In *Row* v. *Row* (2) it was held that the costs of administering the estate must, as between the heir-at-law and the specific devisees, be borne primarily by the real estate descended.

SIR R. MALINS, V.C.:—

18 Eq 585

There is no doubt whatever that the general principle is, that the descended real estate must bear the debts in priority to the specifically devised estate; but here the testator begins by giving all and every part of his real and personal property to be disposed of according to the directions contained in his will. Then, in the first place, he directs that as soon as possible after his death his executors and trustees shall pay all his just debts, funeral and testamentary expenses. If that is not a devise for the payment of debts, I do not know what is. It appears to me to be as clear a devise to pay debts in the first instance as I ever saw. Then, having fixed the payment of debts upon all his property, he proceeds to bequeath all his personal property to his brother, and he devises specific portions of his real estate to certain individuals, but he leaves undisposed of the remaining portion of his real estate. It is to be presumed the testator knew the effect of the law which gives the undisposed of real estate to his heir-at-law; but there is nothing to alter the fact that the whole estate is fixed with the burthen of paying the debts, funeral and testamentary expenses. If nothing had been said about the payment of debts, then the case would have been different; but when he directs that all his estate shall be liable to payment of debts, you cannot say that part shall be exonerated, whether he has devised it specifically or allowed it to descend upon his heir. I decided in this way in the case of *Ryves* v. *Ryves* (3), and in doing so I followed the former decisions in *Fisher* v. *Fisher* (4), *Wood* v. *Ordish* (5), and *Peacock* v. *Peacock* (6). In some of the cases cited the distinction was drawn between an estate devised upon trust for payment of debts, and a

(1) 1 Bro. C. C. 524.
(2) Law Rep. 7 Eq. 414.
(3) Ibid. 11 Eq. 539.
(4) 2 Keen, 610.
(5) 3 Sm. & Giff. 125.
(6) 34 L. J. (Ch.) 315.

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devise subject to the payment of debts; but in this case there is a distinct devise for payment of debts. It has been argued that there is a difference between a lapsed estate and an undisposed of estate, but it would be singular if it were held that the heir-at-law who takes an undisposed of estate which the testator must know will descend upon him, should be in a worse position than when he takes a lapsed legacy which the testator intended he never should take. I think, both upon principle and authority, that this heir-at-law must take the descended estates charged with a rateable proportion only of the debts. It appears to me that the rule that descended estates are liable for the payment of debts in priority to the specifically devised estates, is a very unreasonable rule, and that the Court would be justified in not following it unless it was bound to do so. The order will be that the debts, funeral and testamentary expenses, and the costs occasioned by this suit, are to be all borne rateably by the property which is specifically devised, and that which goes to the heir-at-law.

Solicitor for the Heir-at-law: Mr. *J. W. Sykes.*

Solicitors for the Specific Devisees: Messrs. *Bell, Brodrick, & Gray.*

V.-C. M. 1873 *Jan.* 14, 15.

BELL *v.* HOLTBY.

[1872 B. 325]

Fines and Recoveries Act (3 & 4 *Will.* 4, c. 74), *s.* 32—*Protector of a Settlement—The Office survives.*

A testator devised all his real estate to the use of his son *George*, for life, with remainder to his first and other sons successively, in tail male, and the testator appointed two persons, not including the tenant for life, to be protectors of the settlement under the 32nd section of the *Fines and Recoveries Act*. There was no provision for filling up a vacancy in the office of protector. The tenant for life conveyed his life estate to his son, the Plaintiff, who was the first tenant in tail. One of the protectors died, and the survivor joined with the tenant in tail in a disentailing deed; the estate was then sold to a purchaser for an estate in fee simple:—

Held, that the estate tail was effectually barred by the surviving pro-

tector having joined in the disentailing deed, and a demurrer to a bill for specific performance of the contract for sale was overruled:

Held, also, that where a doubt arises upon the validity of a title, the decision of the Court removes the doubt, and specific performance will be enforced.

RICHARD BELL, by his will, dated the 7th of July, 1849, after disposing of his personal estate, and bequeathing certain legacies, devised all the real estate which should belong to him at his decease to the use of his son *Thomas Bell*, for life, without impeachment of waste, with remainder to the use of *John Varley* the younger and *Jordan Clarke*, and their heirs, during the residue of the life of the said *Thomas Bell*, in trust to preserve contingent remainders, with remainder to the use of *Thomas Bell's* first and other sons successively, in tail male, with remainder to the use of the testator's son *George Bell*, for his life, without impeachment of waste, with remainder to the use of the said *John Varley* and *Jordan Clarke* during the residue of the life of the said *George Bell*, in trust to preserve contingent remainders, with remainder to the use of the said *George Bell's* first or other sons successively in tail male, with remainder to the use of the testator's grandson, *Thomas Bell Wilson*, in fee simple. The will then contained the following clause:—

"And in pursuance of the power and authority given by the Act of the 3 & 4 Will. 4, c. 74, intituled, 'An Act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance.' I hereby nominate and appoint my friends *J. Varley* and *J. Clarke* to be protectors of the several estates, tail created by this my will, with such discretionary powers, authorities, and privileges as are by the said Act annexed to the office of protector."

Richard Bell, the testator, died in August, 1852. On the death of the testator, his second son, *Thomas Bell*, who was under the will first tenant for life, entered into possession of the estate devised thereby, and continued in possession thereof up to the time of his death, which took place on the 21st of February, 1868. He died without leaving issue him surviving.

The testator's son, *George Bell*, was still living, and had issue four children, of whom the Plaintiff was the eldest.

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By a deed dated the 10th of September, 1868, *George Bell* conveyed to the Plaintiff all his life estate in the real property devised by *Richard Bell's* will.

J. Varley, one of the trustees to preserve contingent remainders, and one of the protectors of the settlement appointed by the will, died, leaving *J. Clarke* his co-trustee and co-protector him surviving.

J. Clarke, the survivor of the two protectors of the settlement nominated in *Richard Bell's* will, by indenture, dated the 14th of January, 1871, joined the Plaintiff in a disentailing assurance of the freehold hereditaments. The Plaintiff had previously aliened the hereditaments so as to create a base fee.

By a deed poll, dated the 14th of January, 1871, under the hand and seal of the said *J. Clarke* duly perfected, *J. Clarke* consented to the Plaintiff aliening the copyhold part of the estate, and by a surrender duly made, founded thereon, the copyhold part of the estate was expressed to be surrendered by the Plaintiff to the use of the Plaintiff, his heirs, and assigns.

By a contract in writing dated the 9th of May, 1872, the Plaintiff agreed to sell and the Defendant agreed to become the purchaser of the freehold and copyhold estate comprised in the will of *Richard Bell*, for an estate of inheritance in fee simple in possession, for the sum of £14,500.

The Defendant objected that *J. Clarke* was not at the time of the assurances of the 14th of January, 1872, the protector of the settlement made by the will, and therefore that the said assurances were not effectual to enlarge the base fee in the freehold hereditaments and to bar the estate tail in the copyhold hereditaments. The Plaintiff contended that the objection was without foundation, and that he could make a good title to the estate.

The bill prayed that the purchaser's objection might be declared to be unfounded, and that the contract might be specifically performed under the direction of the Court.

Mr. *Pearson*, Q.C., and Mr. *W. Pearson*, for the demurrer:—

The only question in this case is, whether the office of protector of a settlement survives in case of the death of one of the protectors appointed by the testator. Mr. *Bell* thought fit by his will to

appoint two persons to be protectors, and one of them having died the survivor joined the tenant in tail in a disentailing assurance, and afterwards a contract for sale was executed by the tenant in tail. If the office of protector survives then the purchaser would have a good title, but if not the demurrer must be allowed.

This question has never yet arisen in any case for adjudication, nor has it ever been discussed by any of the writers of text books. The only allusion to the point which can be found is in the case of *Bankes* v. *Le Despencer* (1), which was a suit for the purpose of giving effect to the directions of a settlor as to the settlement of certain estates, and there the Vice-Chancellor of *England* made this observation in reference to the *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74): "The Act of Parliament itself furnishes reasons why a protector should not be appointed by the Court unless upon a special case. By the 36th section a protector is made irresponsible, and is at liberty to act from mere caprice, ill will, or any bad motive. By the 37th section a protector is enabled to take a bribe for giving consent; and if two or three persons are made protector, and any one of them incurs a disability under the 33rd section, then it is questionable at least whether this Court could act in lieu of such person with the other or others who are not disabled; and if it could not, there would be no protector capable of acting." Lord *St. Leonards*, in his book upon Powers (2), refers to these observations in the case of *Bankes* v. *Le Despencer*, but does not discuss the question of survivorship. Arguing by analogy, the case of *Atwaters* v. *Birt* (3) would be an authority in support of our view, for there, in a feoffment to uses, with a proviso that on payment of 12*d.* and procuring the assent of the feoffees the uses should cease, it was held that this gave them an authority, and that if one of them died performance to the surviving feoffees was not a revocation. The Act gives the settlor power to direct that the office of protector shall be filled up and perpetuated in case of the death of any of the protectors, but no such power is inserted in this will; and this shews that the intention of the Act was that if no such power were contained in the settlement the office should not survive. The case of *In re Wainewright* (4) is also an

(1) 11 Sim. 508, 527.
(2) 6th Ed. p. 128.
(3) Cro. Eliz. 856.
(4) 1 Ph. 258.

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authority in support of this view. The Act itself shews what the intention was, since it enables the settlor to appoint persons to be the protector—not protectors, in the plural. This is similar to a power to two or more persons to sell or do any other act. In such cases it is settled that the power must be exercised by the whole of the persons named or it cannot be exercised at all. Lord *St. Leonards,* in his treatise on Powers, says (1), "It is regularly true at common law that a naked authority given to several cannot survive. Therefore, if a man devise his lands to *A.* for life, and that after his decease the estate shall be sold by the executors, naming them, as by *B.* and *C.* his executors, or by *B.* and *C.* who are not named executors, in that case, if one of them die during the life of *A.* the other cannot sell, because the words of the testator would not be satisfied." Then he says that power given to the executors generally may be exercised by the survivors, and he sums up the law in these terms (2): "1. That where a power is given to two or more by their proper names who are not made executors it will not survive without express words. 2. That where it is given to three or more generally, as to 'my trustees,' my sons, &c., and not by their proper names, the authority will survive whilst the plural number remains. 3. That where the authority is given to executors, and the will does not expressly point to a joint exercise of it, even a single surviving executor may execute it. But, 4. That where the authority is given to them *nominatim,* although in the character of executors, yet it is at least doubtful whether it will survive. But where the power to executors to sell arises by implication the power will equally arise to the survivor."

But, apart from the nature of the office of protector, if we look at the statute itself it is clear that it never was the intention that the office should survive, and the latter part of sect. 32 makes the matter clear by providing that in case the persons appointed protector should cease to be so, and no other person shall have been appointed in their place, then the natural protector, that is, the person who would have been protector except for that clause, shall be the protector. This provides for the case we have here, and shews that the office does not survive. A settlor may well be

(1) 7th Ed. p. 143. (2) Page 146.

supposed to have confidence in three persons, or in two, when he would not in the survivors or survivor.

But suppose the Court should be of opinion that there could be a survivorship, still the question is not so clear that a title of this nature can be forced upon a purchaser. A purchaser cannot be compelled to take a doubtful title upon a bill for specific performance. This is laid down in *Dart's* Vendors and Purchasers (1), where all the authorities are cited, and particularly the two cases, *Pyrke* v. *Waddingham* (2) and *Rogers* v. *Waterhouse* (3). In the former case it was laid down that a doubtful title, which a purchaser would not be compelled to accept, was not only a title upon which the Court entertained doubts, but included also a title which, although the Court had a favourable opinion of it, yet might reasonably and fairly be questioned in the opinion of other competent persons; for the Court had no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its opinion in favour of the title should turn out not to be well founded; and in *Rogers* v. *Waterhouse* it was said that although the Court might entertain a strong opinion in favour of the title of a party, that was not sufficient in a suit for specific performance. To force a title on a purchaser, the opinion of the Court must be so clear that it did not apprehend that another Judge would form a different opinion; and in *Collier* v. *McBean* (4), although the two Lords Justices considered the title good, yet, as the Master of the Rolls had decided it was not good, the Court of Appeal would not force the title upon a purchaser. Lord Justice *Turner* said: "The purchaser is entitled to require a marketable title, and the Judge whose decision is appealed from having pronounced the title bad, I think we ought not to force it upon the purchaser unless we can come to the conclusion that his opinion is clearly erroneous." Under these circumstances, therefore, the Court will not force a title upon a purchaser when there is so much doubt arising.

Mr. *Glasse*, Q.C., and Mr. *Charles Hall*, in support of the bill:—

In answer to the last argument which has been raised, that the

(1) 4th Ed. pp. 1009–1012.
(2) 10 Hare, 1.
(3) 4 Drew. 329.
(4) Law Rep. 1 Ch. 81.

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Court will not force a doubtful title upon a purchaser, we may cite the case of *Beioley* v. *Carter* (1) to shew that the Court is bound to decide the question of title in a suit for specific performance. That case came on upon appeal from the Master of the Rolls, who had decided against the validity of the title. The Lords Justices said that, notwithstanding the great weight due to the opinion of the Master of the Rolls, and notwithstanding the observations in *Collier* v. *McBean* (2), they considered it was the duty of the Court of Appeal to form an opinion upon the question of title and to act upon it, as Lord *St. Leonards* had done in the case of *Sheppard* v. *Doolan* (3). They then decided, contrary to the opinion of the Master of the Rolls, that the title was good, and decreed specific performance. The same principle was acted upon in *Bull* v. *Hutchens* (4); *Alexander* v. *Mills* (5); *Radford* v. *Willis* (6).

Upon the principal question the case of *Houell* v. *Barnes* (7) is an answer to the case of *Atwaters* v. *Birt* (8), for there it was held that a power of sale given to executors might be executed by a surviving executor where the power was not coupled with any interest. The office of protector is of a similar character, and on the death of one protector the office survives.

In the case of *Brassey* v. *Chalmers* (9), where a testator devised land subject to payment of debts to *A.* and *B.*, their heirs and assigns, and authorized his executors, thereinafter mentioned, with the approbation of his trustees for the time being, to sell any part of his estate; it was held that the surviving executor, with the assent of trustees appointed by the Court of Chancery, in whom the devised lands were vested by a vesting order, could make a good title; and in *Keer* v. *Brown* (10), where, by an instrument executed before the *Fines and Recoveries Act*, real property was settled to the use of a married woman for life, with remainder over in tail, she was declared to be the sole protector of the settlement, and her husband's consent was not requisite to enable the

(1) Law Rep. 4 Ch. 230.
(2) Ibid. 1 Ch. 81.
(3) 3 D. & War. 1, 8.
(4) 32 Beav. 615.
(5) Law Rep. 6 Ch. 124.
(6) Law Rep. 7 Ch. 7.
(7) Cro. Car. 382.
(8) Cro. Eliz. 856.
(9) 4 D. M. & G. 528.
(10) Joh. 138.

tenant in tail to make an absolute disposition of the property. Lord *St. Leonards*, in his treatise on the New Statutes (1), in commenting upon the case of *Bankes* v. *Le Despencer* (2), adds this observation: "This would not, it seems, affect the right of the trustees as protectors. Whether their right would be affected by a subsequent merger remains to be decided." Mr. *Hayes*, in his book on Conveyancing (3), alludes to this subject, but does not discuss the point now before the Court.

It has been argued that the latter part of the 32nd section of the Act shews the intention of the Legislature to have been that the office of protector should not survive; but it may with some justice be said that it shews just the reverse. The words are, "Provided nevertheless, that the person who, but for this clause, would have been sole protector of the settlement, may be one of the persons to be appointed protector under this clause if the settlor shall think fit; and shall, unless otherwise directed by the settlor, act as sole protector if the other persons constituting the protector shall have ceased to be so by death, or relinquishment of the office by deed, and no other person shall have been appointed in their place." Now suppose two other persons were appointed with the natural protector, this clause shews an intention that the natural protector shall not act alone until both the others have ceased to act, inasmuch as otherwise the object of the settlor would be defeated by the death or retirement of one only of the persons appointed. It was in consequence of the intention that he should not act alone that these words were introduced. The nearest case to that of a protector of a settlement is the office of a guardian, and when it is provided that a legacy shall be paid upon marriage with the consent of *A.*, *B.*, and *C.*, the consent of the survivors or survivor would be sufficient in case of the death of either or both of the others. That was decided in *Eyre* v. *Countess of Shaftesbury* (4). This is not like the case of a power to sell given to trustees *nominatim*, where upon the death of one the power cannot be exercised; but it is like the power attaching to the office of executors, which may be exercised by the surviving executor.

(1) Page 205.
(2) 11 Sim. 508.
(3) 5th Ed. p. 166.
(4) 2 P. Wms. 103.

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That was the reason for the decision in *Atwaters* v. *Birt* (1), where the power was given to be exercised by four distinct persons who were named; of course that was a power which could not be exercised if either of those persons died. The protector of a settlement is an office created by Act of Parliament, and as long as there are any persons in the office the power survives. The office is created by way of substitution for the former state of things; the persons forming the protectorate are to take the position of the tenant for life. By the 22nd section of the Act the owner of the prior life estate is to be deemed the protector; the protector, therefore, is to be treated as the owner of the prior estate. The object of this settlor was to take the control out of the hands of the tenant for life; but if the office does not survive, then immediately on the death of one protector the tenant for life would have the control, notwithstanding the settlor's intention to the contrary. Suppose there had been a power in the settlement to perpetuate the office, that power would be, in case of the death of one or two, to appoint others in their place; and it could never have been the intention that the office should entirely cease until the new protectors had been appointed, for then the tenant for life would become the protector for the time being upon the occurrence of every vacancy, and might join with his son in executing a disentailing deed before the office of protector could be filled up. The Act provides that the newly appointed protector shall act along with any surviving protector, clearly shewing the intention that the office should survive. The tenant for life is not to be the protector unless he is the sole survivor after the death of those appointed. The Act virtually says that if the tenant for life is appointed a protector jointly with two others, and one other should survive, then the two jointly are protectors. When one dies you are to fill up the vacancy; that is, to appoint one more, to be added to the other two; and not to appoint three, as would be the case if the office expired every time one died.

Mr. *Pearson*, in reply:—

The distinction between this case and that of a guardian is that

(1) Cro. Eliz. 856.

the guardian has an interest coupled with an authority. Every guardian in that case is a complete guardian.

Mr. *Glasse*:—These protectors have an interest, for they are appointed trustees to preserve contingent remainders.

Mr. *Pearson* cited *Sykes* v. *Sheard* (1) to shew that a doubtful title could not be forced upon a purchaser.

SIR R. MALINS, V.C.:—

This case, in which I have had every assistance I could have had from the Bar, is one in which I should have reserved my judgment if I had not, last night, had an opportunity of reading every authority which was cited yesterday, and no other authority of any importance has been cited to-day. Indeed, I may say it is a question on which no authority is to be found, for the result of my reading several hours last night was, that I came to the conclusion that there is nothing in the books having the slightest direct bearing on the subject.

The question which has been so elaborately argued before me is whether, when a settlor, instead of leaving the tenant for life to be, as he ordinarily would be, protector of the settlement, avails himself of the power conferred on him by the 32nd section of the *Fines and Recoveries Act*, and appoints other persons protectors, they are in office only during their joint lives, or whether the office survives. If the office survives, then the concurrence of Mr. *Clarke* in this disentailing deed was effectual and the estate tail was completely barred, and under the disentailing deed the purchaser will acquire a good title. If, on the other hand, the office did not survive, then the concurrence of Mr. *Clarke* is ineffectual, and a good title cannot in that case be made. The tenant for life has not concurred; he has been convicted of felony, and the Great Seal has been substituted for the tenant for life. The question therefore is, Does the office, or does it not, survive?

It is very singular that although this Act of Parliament has been in operation close upon forty years this point seems never to have arisen; for various text books have been referred to. Lord *St.*

(1) 2 D. J. & S. 6. 9 Jur. N.S. 262.

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Leonards, Mr. *Hayes* on Conveyancing, and all the books written on the subject, have been accessible, but it is not suggested that any writer has either discussed the question or made any suggestion on the subject. The case, therefore, is left perfectly open. Sir *Lancelot Shadwell*, in the case of *Bankes* v. *Le Despencer* (1), went very fully into the question whether protectors should be appointed or not. It was argued that the protector should be appointed instead of leaving the protectorship to the tenant for life. He came to the conclusion that there were various opinions as to the office of protector, but he did not say a word, nor was he called upon to say a word, as to whether the office was one which continued only during the joint lives of the persons appointed, or whether it survived. The point, therefore, is left perfectly open by him, as it is by everyone else.

The case has been argued chiefly by analogy to other cases, and perhaps it may be said with correctness that there are only two or three cases that have the slightest application to this case. First, it is said on the part of the Plaintiff that this is regulated by the case of *Houell* v. *Barnes* (2). Mr. *Pearson* and his junior, Mr. *William Pearson*, rely upon *Atwaters* v. *Birt* (3). *Atwaters* v. *Birt* was a case where there was a settlement of an estate, with a power of revocation if a tender was made to four persons named. One of them died, and the decision was that the tender to the survivors was ineffectual. In other words, the decision was that a mere naked power like that, given to persons *nominatim*, does not survive. In opposition to that Mr. *Glasse* relied upon *Houell* v. *Barnes*, where a mere power of sale being given to executors it was held that it did survive, and that the surviving executor could effectually exercise that power. The question there was, whether it was annexed to the office or whether it was an individual power. I am inclined to think I must reject *Houell* v. *Barnes* as well as *Atwaters* v. *Birt*. *Houell* v. *Barnes* decided that the power was annexed to the office and not to the individuals, because the law is clear, that if a man authorizes executors to sell, the surviving executors can most unquestionably sell; but if he authorizes *A.*, *B.* and *C.* to sell, without saying anything about survivors, it being

(1) 11 Sim. 508. (2) Cro. Car. 382.
(3) Cro. Eliz. 856.

a mere naked power, then, I believe, the law is clear that if one dies the two survivors cannot make a title, but other means must be resorted to for the purpose. If, therefore, this were a mere naked power, probably it would be decided upon the principle of *Atwaters* v. *Birt* (1). But it is not a mere naked power; it is not an interest; it is something *per se;* it is not like anything else. It is an office created by Act of Parliament, and in order to see what the office is one must look at the Act of Parliament to see what the intention of the Legislature was. This Act was framed by one of the most eminent real property lawyers of his day, and one of the most skilful draftsmen of the age, and therefore one must look at it with the greatest possible respect; and such a doubt as this having arisen upon an Act on this subject, prepared by a man so skilful as Mr. *Brodie*, shews what difficulties there always must be, whether it be in a general code or in a code on a particular branch of the law, as this Act is, in foreseeing all the difficulties that will arise, and *à priori* providing for the infinite variety of transactions which no human sagacity can foresee. This is an office created by Act of Parliament, and in order to arrive at a conclusion on this important subject, you must see what the position of affairs was and what was the object of the Legislature in making these provisions.

Those who are old enough to remember the period when fines and recoveries existed—and there is some advantage even in being old enough for that—would know that no effectual recovery could be made without the concurrence of the freeholder. Now this Act of Parliament introduces several new things. Before this Act—and it was a very common thing—when parties wanted to tie up property as long as they could, a settlor, instead of giving his son a tenancy for life, gave a tenancy for ninety-nine years if the tenant for life should so long live. Therefore an estate might be settled to *A.* for ninety-nine years, if he should so long live, with remainder to his first and other sons in tail, and so forth. The tenant for life was not in that case a consenting party, and it was not necessary for him to concur in the recovery. This Act makes both a tenant for years determinable on a life, and a tenant for life a protector, when there is no other appointed. It

(1) Cro. Eliz. 856.

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makes the tenant for life in the ordinary sense protector, but it adds the extraordinary power given by the 32nd section, the wisdom of which I am unable to see, to enable a settlor to take the power of barring the estate out of the control of tenant for life and his son, and put the control in the hands of different persons. The 32nd section enacts that the settlor may provide and appoint any number of persons, not exceeding three, to be protector of the settlement, and it provides that in case of vacancies in the office the vacancies may be supplied. This testator, availing himself of this power, appointed these two gentlemen as protector of the settlement. If this is to be regarded as a mere naked power, then I say the case of *Atwaters v. Birt* (1) applies, and the office does not survive. If it is a power like that of an excecutor attached to the office, then the case of *Houell* v. *Barnes* (2) applies, and the office survives. My opinion is, it is neither one nor the other, and that neither of the two cases regulates the decision I ought to come to.

What, then, is it? Now, in order to test it you must look at the consequences. If the office does not survive, this testator, having appointed two persons protector, it is clear that directly the office of protector ceases the protectorship falls back on the tenant for life. In this case, after the death of *Thomas*, the testator's son, *George Bell*, became tenant for life in possession, with remainder to his first son in tail male, and if there is no protector, *George Bell*, as tenant for life, is the protector. Now there might have been three persons appointed, and if Mr. *Pearson's* argument is right the death of one would cause a total cessation of the protectorship, for there is no power of appointing a successor under this will, and therefore the death of any one of the three would have caused a cessation of the office of protector, and there being no other protector, it would at once fall back into the hands of *George Bell*, the tenant for life. Is it more consistent with the intention of the testator—is it more consistent with the intention of the Legislature—that the office, to which no interest is attached, should be regarded as one continuing to the survivor or survivors? or is it a joint office, by which the office of all would come to an end as soon as one died, and the control would fall back into the hands of the tenant for life?

(1) Cro. Eliz. 856. (2) Cro. Car. 382.

There would be so many inconveniences if that were so, that I cannot think it was the intention of the Legislature. The Legislature having armed the testator or settlor, as the case may be, with this power, it would be very inconsistent that directly one died the power should go into the very hands that the settlor had shewn an anxiety that it should not go into, because if he had wanted his own son appointed protector, why appoint a protector at all? He puts on the grandson the necessity, not of appealing to his own father, but to contend with an arbitrary power vested in the hands of indifferent persons, who would not be inclined so readily as the father might be to bar the estate, which the testator has shewn an anxiety should be preserved longer than if the protectorship had been left in the hands of his own children as tenants for life. Therefore, in point of convenience, it seems to me that the construction is much more in favour of its being a joint tenancy, that is, not an office during the continuance of the joint lives, but an office continuing while the persons originally named, or any one of them, are or is alive, and only coming to an end when all are dead.

I also think that this view is considerably favoured by the words at the end of the section, "Provided further nevertheless, that the person who, but for this clause, would have been sole protector of the settlement, may be one of the persons to be appointed protector under this clause" (it was not so in this case), "if the settlor shall think fit, and shall, unless otherwise directed by the settlor, act as sole protector, if the other persons constituting the protector shall have ceased to be so by the death or relinquishment of the office by deed;" "if the other persons," not the other person, but "the other persons," shewing, therefore, that if the tenant for life be one, and there be two other persons, he is not to become protector again when one of them dies, but when the other persons so appointed ceased to have any power by death. I think that shews that if two be associated they must both be dead before it falls back on the tenant for life, and therefore, on that ground, it seems to me that every rule of construction is in favour of holding that this is an office to which survivorship is attached. It is quite true (and I agree with all that Mr. *Pearson* said on the subject) that the grant of a mere

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office, as in the case referred to in the 11th Coke (1), *Jones* v. *Beau* (2), to two persons does not mean that the office is to survive unless so granted. I have already said that a mere naked power of sale to several persons is an authority to them while they are all alive, and it ceases when one dies; but this is a peculiar office. I think the words, " to the person or the survivor," were not inserted because it was the intention of the Legislature that it was to be an office to continue while any one was alive. I think every rule of convenience is that it should not be taken out of the hands of the persons appointed while those persons, or any one of them, continue to exist. That is my view of the section. I have given a great deal of consideration to it, and that is the conclusion to which I have come. I do not think the analogy between a mere naked office and one in which there is an interest would apply; but you must look at the intention of the Legislature and the various views taken, and upon that I form my opinion.

Perhaps the most direct analogy is the case of testamentary guardians. If a man appoints two persons guardians of his children, by that, he says, I commit the care of my children, their fortune, their education, and everything that is dear to them, to *A.* and *B.*, but he does not necessarily mean to give it to *A.* and *B.* alone. It has been settled by the case of *Eyre* v. *Countess of Shaftesbury* (3) that the office of testamentary guardian does survive, and therefore, although a man appoints his wife and two friends guardians of his children, the survivor of the three is a complete guardian, and has all the authority which the three had when they were alive. That is so as to guardians of the person. Therefore I take it the case of a guardian is the nearest analogy there is. Two persons being appointed guardians, the survivor becomes guardian of the person, to protect every interest attached to that office. I do not see any interest arising to prevent the survivor of two persons who are appointed protector of the estate from being the protector as well as the two. That is, therefore, the conclusion at which I arrive.

There is one other point I ought not to pass over. It has been

(1) Page 15. (2) 4 Mod. 16.

(3) 2 P. Wms. 103.

urged upon me that if there is any doubt about it, this is not a title which should be forced upon the purchaser. I am happy to find that, quite in accordance with my own opinion, that notion about doubtful titles not being forced upon purchasers has disappeared in modern decisions. I entirely and most heartily concur in the judgment of the Lords Justices *Selwyn* and *Giffard*, in the case of *Beioley* v. *Carter* (1), in which, although the Master of the Rolls thought there was a doubt whether a sale could take place under the *Leases and Sales of Settled Estates Act*, because the consent of unborn persons could not be obtained, although the Master of the Rolls thought a title could not be made, and the very circumstance of his thinking so created a doubt, the Lords Justices, having a contrary opinion, would not allow it to be the ground of a doubt, because it was the duty of the Court to remove such doubts. That has been followed by the cases of *Bull* v. *Hutchens* (2) and *Radford* v. *Willis* (3). I think, therefore, it may be considered as settled that where doubtful cases of construction arise, whether on an Act of Parliament or the words of an instrument or will, it is the duty of this Court to remove that doubt by deciding it; and instead of feeling a doubt whether other Judges at other times may think in the same way with them, I consider it is the duty of the Court to assume that that which a competent tribunal has at one time decided will be followed at future times, and that that which Judges of the present time think right it is to be assumed Judges of equal competency in the future will think right also. This is a peculiar case, and if there be any doubt on the subject, it is the duty of the Court to remove it. If it is a question of construction on an Act of Parliament, the question of construction must be decided by the Court, and when a doubt is raised on an Act of Parliament the Court removes the doubt by deciding one way or the other; and when it is once decided it cannot be taken to be a doubtful point any longer. I do not feel any doubt on this subject, and I come to the conclusion that the office is one which did survive; the consequence of which is, that Mr. *Jordan Clarke*, as surviving protector appointed, was the protector of the settlement; and the disentailing deed having been executed by the tenant in

(1) Law Rep. 4 Ch. 230. (2) 32 Beav. 615.
(3) Law Rep. 7 Ch. 7.

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tail with his concurrence, there is an effectual bar of the estate tail, and a good title can be given to the purchaser. The consequence is, I must overrule the demurrer.

I think it would be better to preface the decree with the words, "The Court being of opinion that *Jordan Clarke*, having survived the other protector, *J. Varley*, was the protector of the settlement." Then it follows that the estate tail was barred with his concurrence, and that a good title can be made. I say nothing about costs, as I understand they have been provided for.

The case has been raised in a most proper manner by demurrer to a bill of three pages.

The demurrer, therefore, is simply overruled.

Solicitors for the Plaintiff: Messrs. *Gregory, Rowcliffes, & Rawle.*
Solicitors for the Defendant: Messrs. *Sharp & Ullithorne.*

V.-C. M. 1873 Jan. 17.

In re ELLIOT'S TRUSTS.

Trustees Relief Act—Payment into Court—Trustees' Costs.

Trustees will ~~not~~ be ~~allowed~~ ordered to pay the costs occasioned by paying money into Court under the *Trustees Relief Act*, when they do so for the mere purpose of escaping liability, and when there is no reasonable doubt as to the performance of their trust.

THIS was a Petition for payment out of Court of a sum of £2688 15s., which had been paid in by the trustees of the will of *Philip Elliot*. The testator by his will, which was dated the 12th of May, 1846, gave a legacy of £7000 to his son *George Letsom Elliot*, his brother *Henry Capel Elliot*, and *Richard Rickards*, upon trust to invest and pay the dividends to his son *George Letsom Elliot* for life, and afterwards to his son's wife, *Gertrude Elliot*, for life, in case she should survive him, and upon the decease of the survivor, then upon trust to transfer the capital to the testator's grandchildren, *George Henry*, *Amelia*, and *Marianne Elliot*, equally, the share of *George Henry* to be vested at twenty-one, and the shares of *Amelia* and *Marianne* to be vested at twenty-one or marriage.

The testator died in December, 1847, *Gertrude Elliot* died in December, 1860, and *George Letsom Elliot* died in March, 1871. *Richard Rickards*, the trustee, died in the year 1857, and *Walter Rickards* was appointed a trustee in his place, and the said *Henry Capel Elliot* and *Walter Rickards* were now the only trustees of the will. Upon the death of *George L. Elliot*, the Petitioner, *George Henry Elliot*, his son, who attained the age of twenty-one in 1854, became absolutely entitled to receive one-third part of the £7000, or of the fund representing the same.

In 1858 the Petitioner, who had quarrelled with his father, left *England* and went to *Australia*, but did not communicate with any of his family for thirteen years, and upon the assumption that he was dead, his sister was let into possession of an estate to which she was entitled after the death of her brother. In the month of June, 1871, in consequence of an advertisement inserted in the *Melbourne Argus* by Messrs. *Griffith & Brownlow*, the Petitioner wrote to them informing them that he was *George Henry Elliot*, and asking for further information about his family. In answer to this letter, Messrs. *Griffith & Brownlow* wrote, in August, 1871, informing the Petitioner of the death of his father and mother, and that he was consequently entitled to a third part of the legacy of £7000.

On the 26th of February, 1872, Messrs. *Griffith & Brownlow* received a letter from the Petitioner, requesting them to forward him funds to enable him to return to *England*. This letter was shewn to the Petitioner's brother, Captain *Philip Elliot*, and to his sister, *Marianne Elliot*, and both of them were satisfied of the Petitioner's identity. Messrs. *Griffith & Brownlow*, who had been in communication with the trustees of the will, and who had been informed by their solicitor, Mr. *E. J. Rickards*, that they contemplated paying the shares of the Petitioner and of *Marianne Elliot* into Court under the *Trustees Relief Act*, wrote the following letter to Mr. *E. J. Rickards* on the 9th of April, 1872:—

"Dear Sir,—Mr. *George Henry Elliot* has intimated his intention of returning to *England*, and we have dispatched to *Australia* the funds necessary to enable him to return. We cannot advise that there is any necessity whatever for the payment into Court in a case where the person entitled is about to return to *England*.

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Proper evidence of his identity will doubtless be forthcoming, and should the trustees incur unnecessary expense by the payment in, they must do so at their own risk."

Messrs. *Griffith & Brownlow* wrote a subsequent letter to Mr. *E. J. Rickards,* urging upon him the impropriety of paying the money into Court. The Petitioner's sister also urged that the expense should not be incurred of paying the money into Court as she was satisfied that her brother would shortly return to *England;* but, notwithstanding these facts, the money forming the share of the Petitioner was paid in on the 7th of May, 1872.

The trustees, shortly after the death of *George Letsom Elliot,* paid over the one-third share in the fund to which *Amelia Elliot* was entitled, to the trustees of her marriage settlement, but the third share, to which *Marianne Elliot* was entitled, they had paid into Court with the share of the Petitioner, upon an affidavit which set forth that the late *George Letsom Elliot,* the father of the three legatees, was one of the trustees of the legacy, and as they feared that it was possible he might have received information respecting charges or claims on the shares of *George Henry Elliot* and *Marianne Elliot* in the said legacy, with which they were unacquainted, they desired the protection of the Court in this particular also. The share to which *Marianne Elliot* was entitled was paid out to her upon a petition presented in July, 1872, and the trustees were then ordered to pay the costs of paying the money in.

The Petition stated that, immediately upon the return of the Petitioner to *England* he saw his brother and sister, *Philip Herbert Elliot* and *Marianne Elliot,* and his uncle, *Henry Capel Elliot,* all of whom at once recognised him and were perfectly satisfied with his identity; and there had been no doubt whatever as to his identity in any other person. There was no ground whatever for the statement of the trustees that *George Letsom Elliot* might have received information concerning charges or claims upon the share of the Petitioner in the legacy, with which they were unacquainted.

Mr. *Glasse,* Q.C., and Mr. *Holmes,* in support of the Petition.

Mr. *Bedwell,* for the trustees:—

In paying this money into Court the trustees acted in a *bonâ*

fide manner, and under the advice of counsel. After the Petitioner's long absence of thirteen years in *Australia*, without communicating with his family, the trustees had good ground for concluding that he was dead, more particularly as he must have known that he was entitled to this money under his grandfather's will. The letter written by him from *Australia* might have been sent by any fraudulent claimant, and the trustees were justified in seeking the protection of the Court. It was not till his return to this country, after the money was paid in, that his identity was clearly established. The Court will not punish the trustees by making them pay costs when they were acting as they thought best under the peculiar circumstances of the case.

Sir R. Malins, V.C.:—

This is a Petition by *George Henry Elliot*, praying that he may have payment out of Court of a sum of £2249 bank annuities, and the dividends which have accrued due, making together the sum of £2688 15*s*. The case is peculiar, and the question I have to decide is whether the trustees are to bear the costs occasioned by paying the money into Court.

Upon the death of the father of the Petitioner in 1871 the right of the children under the will of *Philip Elliot* accrued, and they became entitled in equal shares to this fund. The Petitioner went abroad in 1858, and nothing was afterwards heard of him for thirteen years, and his sister was let into possession of another estate left under the will upon the assumption that the Petitioner was dead. It appears that he arrived from *Australia* last year, and on his arrival his identity was so clear that no one had any doubt whatever about it. His uncle, who was one of the trustees, also admitted his identity.

Now, at the time when the trustees were uncertain whether he was living or dead, they might with propriety have paid the money into Court, but they did not do so then; on the contrary, they retained it in their possession until they were informed that a letter had been written by him from *Australia*, stating that he should return home immediately, and then they insisted upon paying the money into Court, notwithstanding the

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representation made to them that they should wait until the Petitioner's arrival in *England*. The Petitioner left *England* when he was twenty-six years of age, and a man does not often change so much after that age that he cannot be easily recognised, and there was every reason to suppose that his identity would be at once proved, and that would have settled the question without further trouble or expense. But instead of waiting until his arrival in *England*, and although there had been this letter purporting to come from him, which had satisfied his sister and brother of his identity, the trustees took this course of paying the money into Court. The Petitioner's sister had a decided interest in his not returning, but even she was so satisfied of his identity that she wrote a most urgent letter, begging that the trustees would not take the unnecessary course of paying the money into Court, but would retain it till his arrival. Nothing would do, however, but they must pay it into Court. The circumstances would have justified them in doing so if they had done it long ago, and then they would have had their costs, but when they were informed that the man was alive and was coming home, common sense and prudence should have dictated that they should have retained the fund until his arrival. When he did actually arrive he was seen by his brother and sister and his uncle, the trustee, who all recognised him at once, and upon this the money might have been paid to him directly. By the present proceedings the fund will be greatly diminished, and I am sorry to find that the trustees were not taught a better lesson when, in deciding the case in July last, regarding the sister's share, which they also paid into Court, I ordered them to pay the costs. I decided that they were not then bound to make inquiries about the incumbrances on the fund. I think these proceedings were perfectly unjustifiable, and although it is clear that the Court will incline towards the payment of the costs of trustees when they act in a *bonâ fide* way, still, on the other hand, it is most important that trustees should not incur unnecessary expenses for the mere purpose of relieving themselves of all liability, and particularly so when there is no reasonable doubt in their way. Their plain duty in this case was to have kept the fund till the Petitioner returned home, and then

to have paid it over to him if they had no doubt of his identity. I can find no excuse for their having paid the money into Court except a restless anxiety to get rid of it, and I cannot relieve them from the payment of costs.

A proposal having been made that a fixed sum should be awarded by way of costs, and this not being agreed to, the Vice-Chancellor decided upon allowing costs as between party and party.

Solicitor for the Petitioner: Mr. *G. J. Brownlow.*
Solicitor for the Trustees: Mr. *E. J. Rickards.*

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SOBEY *v.* SOBEY.

[1870 S. 285.]

Practice—Ne Exeat.

Upon evidence that a Defendant, who has been ordered by decree in an administration suit to pay into Court on or before a certain day the balance admitted by his answer to be due from him to the estate, is about to leave the country, a writ of *ne exeat* may be obtained against him by his co-Defendants, the executors, although the day to which the time for payment was extended has not arrived.

THIS was a motion on behalf of the Defendant, *W. T. Sobey*, that a writ of *ne exeat* issued against him on the 14th of December, 1872, under which he had been arrested and lodged in *Lancaster* Gaol, might be discharged with costs and damages to be certified and paid by the Defendants *John Sobey* and *Thomas Olver*, who had applied for and obtained the writ.

The suit was for administration of the estate of *Thomas Sobey*, the testator, of whom the Defendants *John Sobey* and *Thomas Olver* were executors. By the decree made on the 4th of December, 1872, it was ordered that the Defendant *W. T. Sobey*, who had been in receipt of the rents of testator's real estate and had had the control of portions of his personal estate, should, on or before the 1st day in Hilary Term, 1873, pay into the bank, to the credit of the cause, the sum of £600 (admitted by his answer to be the balance due from him to the estate.)

On the 14th of December, 1872, the Defendants *John Sobey* and *Thomas Olver* moved *ex parte* for a writ of *ne exeat* against *W. T. Sobey*, and the application was supported by the affidavit of Mr. *Hingston*, their solicitor, stating that *Sobey*, who was a solicitor, after selling his furniture and property, and giving a power of attorney, was seen to leave *Plymouth Station* on the 12th of December, 1872, for *Liverpool*. "He said he was going to see his son off for *America*: he would not say that he was not going himself." He had his luggage with him, and informed deponent that he had with him in his portmanteau his books, diaries, and papers relating to the suit.

In support of the application *Done's Case* (1) was cited as an authority that in matters of account, where money was sworn to be due, one Defendant might obtain the writ against a co-Defendant without filing a bill; and *Whitehouse* v. *Partridge* (2) was referred to upon the question whether the writ might be granted before the day fixed for payment when the Court was satisfied that the party was going abroad to evade payment.

The Vice-Chancellor made the order upon the usual undertaking.

The Defendant *W. T. Sobey* now moved to discharge the order, and, in support of the motion, had filed an affidavit stating that he was compelled, through a severe domestic affliction, to break up his establishment at *Lostwithiel*, but did not sell all his furniture and effects in so doing, but the most bulky portion only, and that this was more than twelve months since; that the Plaintiff, *E. G. Sobey* (his younger brother), knew where he was going and for what purpose, had his address, and forwarded letters to him at *Liverpool*. Referring to the meeting with the Defendants' solicitor at *Plymouth Station*, *W. T. Sobey* stated that he did not say he was going to see his son off to *America*, but that he was going to see him off to sea. When asked if he were himself going abroad, he replied, "Certainly not," and to the best of his knowledge and belief the word *America* was not mentioned; and on leaving he gave *Hingston* his *Liverpool* address, at which he was arrested four days afterwards. He also stated: "I had not nor have the slightest intention of leaving *England* and taking up my permanent abode anywhere abroad, nor had I made any preparation for so doing, and I left my correct address with the Plaintiffs and the solicitor of my co-Defendants."

Evidence was given in opposition to the application, confirming and amplifying the statements upon which the writ had been obtained.

Since his arrest and confinement in *Lancaster* Gaol, a deed giving the Defendants a security for the balance due from him had been forwarded to *W. T. Sobey* for his execution.

Mr. *Eddis*, Q.C., and Mr. *Badnall*, in support of the motion:—

First: The evidence now adduced clearly shews that the Defen-

(1) 1 P. Wms. 263. (2) 3 Sw. 365, 375.

(a) See W N (1872) 230.

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dant, *W. T. Sobey*, had no intention, as alleged, of leaving the country or of evading the order of the Court for payment of the money; and in any case, as he is ready to execute a security for the amount, he cannot be detained in custody any longer. Secondly: Even assuming that the evidence of intention to leave the country was sufficient, the writ was irregularly issued. Until the day fixed for payment (the 11th of January, 1873) the money was not actually due, and the writ of *ne exeat*, which is in the nature of equitable bail, can only be issued on an equitable debt then due and payable, and where if it was at law bail could be had, and this rule has been held to apply even where the obligor, upon a bond payable on the 1st of January, by agreement obtained indulgence until the 1st of July, and in the last week in June declared his intention of leaving the kingdom to evade payment: *Dawson* v. *Dawson* (1); *Whitehouse* v. *Partridge* (2); *Haffey* v. *Haffey* (3).

Mr. *Kay*, Q.C., and Mr. *Bevir*, *contrà*:—

We say it is clear that *W. T. Sobey* intended to leave the country to evade compliance with the order of the Court. The debt to the estate was admitted by his answer, and was actually due from him before the order was made for payment of the amount on or before the 11th of January, 1873. The mere fact that time was given for payment by way of indulgence cannot enable the Defendant to escape from the terms of the order. "If the Court, having granted time for payment of money, is satisfied before the time arrives that the party is going abroad to prevent payment of the money, it will undoubtedly interpose:" *per* Lord *Eldon*, *Whitehouse* v. *Partridge* (4). In the cases cited the cause of action had not arisen, but here the debt was admitted by the Defendant's own answer to be then due and owing, and the effect of the decree was only to allow time for payment, so that the *dicta* do not apply.

Mr. *Eddis*, in reply:—

Before the day fixed for payment the executors could not have

(1) 7 Ves. 173.
(2) 3 Sw. 365, 377.
(3) 14 Ves. 261.
(4) 3 Sw. 375.

claimed the money, and therefore were not entitled to apply for the writ.

SIR JAMES BACON, V.C.:—

There is no doubt in this case, either upon the law or the facts. The decree of this Court for payment of a sum of money is equivalent to a judgment at common law, and will be enforced, if necessary, by a writ of *ne exeat regno*. The case of *Whitehouse* v. *Partridge* (1) is no authority against granting the writ, but rather in favour of it. Lord *Eldon* there says: "If the Court, having granted time for payment of money, is satisfied before the time arrives that the party is going abroad to prevent payment of the money, it will undoubtedly interpose." In the case referred to by Lord *Eldon*, which seems to have much impressed him, as he frequently refers to it, the creditor having given time to his debtor from the 1st of January to the 1st of July, the debtor during the last week in June thought proper to attempt to leave the kingdom, and on great consideration the Court decided that it could not grant the writ. But in that case no cause of action had arisen until the time fixed for payment had expired, and the debtor could not have been held to bail at common law. The practice at common law was entirely different, for formerly the Plaintiff, if he chose to issue the writ, could hold the Defendant to bail, whether there was any attempt to escape or not; and now, by the recent Act for the Abolition of Imprisonment for Debt (32 & 33 Vict. c. 62), s. 6, it is provided, that where the Plaintiff in any action—in which, if brought before the commencement of the Act, Defendant would have been liable to arrest—proves that he (Plaintiff) has good cause of action to the amount of £50, and that there is probable cause for believing that Defendant is about to quit *England*, and that the absence of the Defendant from *England* will materially prejudice the Plaintiff in the prosecution of his action, the Judge may order such Defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given the prescribed security."

Here there was an order of the Court for payment upon the admissions of the Defendant contained in his answer, and the

(1) 3 Sw. 365, 375.

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extension of time for payment until the 11th of January, 1873, could not alter his liability to pay, or do away with the effect of that which was in the nature of a judgment against him for the amount. The only remaining question is, whether the Court is satisfied that the Defendant intended to leave the country for the purpose of defeating this order. Upon the evidence [to which his Honour referred] I should be wrong if I expressed the slightest hesitation or doubt as to the intention to leave the country. That being so, the writ was, in my opinion, properly issued; and the other Defendants had a right to prevent *W. T. Sobey* from leaving the country. As, however, it has been proposed that he shall execute a security for payment of this money, he will be discharged upon executing the security.

MINUTE OF ORDER:—Upon executing the assignment and undertaking to make an affidavit as to all deeds, &c., in his possession, &c., relating to testator's estate, and to deposit the same with his agents, let Defendant *W. T. Sobey* be discharged from custody. Defendant *W. T. Sobey* to pay to Defendants *John Sobey* and *Thomas Olver* their costs of the writ of *ne exeat* and of this application.

11 June 1873 B. 5

Solicitors: Messrs. *Sole, Turner, & Turner;* Messrs. *Coode, Kingdon, & Cotton.*

V.-C. B. 1872 *Dec.* 13, 14. 1873 *Jan.* 14.

LEE *v.* SANKEY.

[1871 L. 8.]

Breach of Trust—Solicitor dealing with Trust Estate—Payment to one Trustee—Discharge.

A firm of solicitors having been employed by the trustees of a will to receive the proceeds of the testator's real estate, which had been taken by a railway company, paid over the money to one of such trustees without the receipt or authority of the other. The money having been lost to the estate by the insolvency and death of the trustee to whom it was paid:—

Held, that the receipt of one trustee only (though also an executor) was not a sufficient discharge to the solicitors for the money which they had received by the authority of the two, and that they were personally liable to make good the loss which had resulted to the trust estate from such improper payment.

9 Ch 251. 4 QBD. 539

THIS was a bill by *Grace Lee* (since deceased), widow and surviving trustee of the will of the testator, *John Lee*, and by her

children beneficially interested thereunder, against the Defendants, a firm of solicitors, for the purpose of rendering them accountable in respect of the trust moneys which had come to their hands with notice of the trust, and had been lost by the insolvency of the co-trustee, to whom the fund had been handed over by the Defendants.

John Lee, by his will, dated the 19th of August, 1847, gave all his real and personal estate to his wife, *Grace Lee*, and his brother-in-law, *John Ginder*, upon trust to call in and convert into money all his personal estate, and to sell and dispose of his real estates, and to receive the moneys arising from such sale, and give effectual discharges for the same, and stand possessed thereof upon trust to permit his wife to receive the income during her life or widowhood, with a direction for her thereout to maintain his children during their minorities; and from and after the death or second marriage of his wife, upon trust for all his children in equal shares. Power was given to the trustees to appropriate, without prejudice to subisting trusts, all or a competent part of the prospective shares of the children for their advancement; and the testator appointed *Sarah Lee* and *John Ginder* executors and trustees of his will.

John Lee died in June, 1853, leaving his widow and seven children, and his will was proved by both the executors.

In April, 1859, part of the testator's real estate was sold for £1425 to the *Margate Railway Company* by the trustees, who employed the Defendants as their joint solicitors in the matter of the sale, and otherwise in relation to the affairs of the testator, and, as the bill alleged, the Defendants perused and were well acquainted with the contents of the will of the testator, and with the rights of his widow and children thereunder. The purchase-money, which amounted, principal and interest, to about £1500, was received by the Defendants under the authority of *John Ginder* and *Grace Lee* as trustees. Out of the moneys so received, £360 was applied in the purchase of a freehold property, which was conveyed to *John Ginder* alone; but after his death a conveyance of this property to *Grace Lee* from *John Ginder's* heir-at-law was obtained by the Defendants. Another sum of £200 was paid to the Plaintiff *Emily Curling*, one of testator's daughters, as an advance-

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ment on her marriage, in pursuance of the proviso for that purpose contained in testator's will.

John Ginder died on the 30th of August, 1866, insolvent.

In September, 1866, *Grace Lee* applied to the Defendants for an account of the investments of the trust estate, and the Defendants furnished her with an account, from which it appeared that various sums, amounting to about £800, had been from time to time, between April, 1861, and January, 1865, paid to *John Ginder*, the trustees being debited with the moneys as having been paid "to Mr. *Ginder*." This money having been employed by *John Ginder* in various speculations, and, on his death in a state of insolvency, lost to the trust estate, the bill was filed in January, 1871, by *Grace Lee* and her children, for the purpose of compelling the Defendants, Messrs. *Sankey*, to make good the loss occasioned by paying over the money to *John Ginder* alone, without, as it was alleged, the authority or sanction of his co-trustee, the Plaintiff *Grace Lee*.

The Defendants, by their answer, admitted their employment as solicitors by the trustees, and the receipt of the moneys, and stated that, so far as they had anything to do with moneys forming part of the testator's estate, *Grace Lee* acted entirely upon the advice of her brother *John Ginder*, ratified his acts, and left to him the conduct of the business; and that she authorized the Defendants, expressly and by her knowledge of and acquiescence in what was being done (when she did not specially authorize them herself), to look upon and act upon instructions from him, as joint instructions from her and him together. It appeared that £700 of the money was for some time retained in their hands, and advanced by them on temporary loans to various clients pending final instructions from *Grace Lee* and *John Ginder* (to whom they allowed interest, paying it to *John Ginder* by the joint instructions of himself and *Grace Lee*), and until an eligible permanent investment could be made. The moneys, when paid over to *J. Ginder*, were, as the Defendants alleged, with the consent and acquiescence of *Grace Lee*, invested in the purchase of ships, while parts remained uninvested in his own hands. They also alleged that part of the moneys received by *Grace Lee* as income consisted, to her knowledge, of profits resulting from such pur-

chases of ships, and moneys paid by *J. Ginder* in the way of interest on moneys so retained in his hands. They also alleged that, upon the death of *J. Ginder*, *Grace Lee* had, to the exclusion of his other creditors, received the whole of his personal estate in satisfaction of her claim. The *Statute of Limitations* was also set up as a bar to any claim by the Plaintiffs.

In answer to an averment in the amended bill that *Grace Lee* never gave any instructions as to the £700, and that the money was, in fact, borrowed by the Defendants with full knowledge of the trust, and used by them in their business, the Defendants denied such averment, stating that it was entirely owing to the instructions of *John Ginder* and *Grace Lee*, given by her, as already stated, that no permanent investments were made of the money in the names of the trustees or either of them; and that *Grace Lee* desired that as much interest on it as possible should be made.

In her affidavit, Mrs. *Lee* denied that she had, expressly or by acquiescence, authorized the Defendants to look to instructions from *John Ginder* as instructions from them jointly. She stated that in 1861 *John Ginder* told her that the money was in the hands of the Defendants, and that they would pay interest for it or invest it. She never heard anything further about the investment of the money, either from *Ginder* or from the Defendants. *Ginder* from time to time paid her moneys, which he said were for interest in the hands of the Defendants. It appeared that in August, 1869, she went to *Canterbury*, accompanied by her son-in-law *Edwin Curling*, and saw one of the Defendants at his office. "I said to him, 'You are aware that I knew nothing of the way in which the greater part of this money has been expended.' He replied that he thought I was aware, and had given *J. Ginder* authority to receive it. I said that I had not done so, and that I thought it was his duty to have apprised me of it . . . . I called his attention to the account, and said, 'You don't begin to make payments to my brother till May 6. What does the cheque April 29 mean? You did not pay me that money.' He replied that he supposed it had been drawn out for me. I said it was not by my authority. He then said, 'Did I pay you the two cheques for *Emily*?' I said, 'Yes, you gave them to me; and if my presence was required when you settled that business, why was it not

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when you paid these sums to my brother?' He said, 'I know you did not give your authority, but I quite supposed you knew it was being done.'"

The account given by Mrs. *Lee* of this interview was confirmed by her son-in-law, who was present at it, and her account of a subsequent interview to the same effect was also confirmed by her daughter, *Helena Lee*, who was with her.

The Defendants, by their affidavits, denied that these conversations were correctly stated; and they had filed a concise statement, with interrogatories for the examination of *Grace Lee*, and served her with notice for her cross-examination upon her affidavit. From her illness at the time, her answer and cross-examination had to be postponed; and she died on the 29th of December, 1871, without having answered the concise statement, or having been cross-examined. *Edwin Curling* and *Helena Lee* had not been cross-examined.

Mr. *Eddis*, Q.C., and Mr. *H. J. M. Williams*, for the Plaintiffs:—

The Defendants, who were solicitors of the trust, admit the receipt of money representing the proceeds of testator's real estate, and having, with notice and full knowledge of the trust, permitted one of the trustees, their client, to commit a manifest breach of trust, they are liable to the *cestuis que trust* for the amount lost. Although in *Maw* v. *Pearson* (1) the agent of a trustee was held accountable to his employer only, and not to the *cestuis que trust;* if, knowing that a breach of trust is being committed, the agent interferes and assists in that breach of trust, he is personally answerable as a participator in the breach of trust: *Attorney-General* v. *Corporation of Leicester* (2); and where solicitors have taken upon themselves to receive the trust moneys and intermeddle with the performance of the trust, they become liable to make good the money to the *cestuis que trust*, and are subject to the same responsibilities as trustees: *Hardy* v. *Caley* (3); *Lewin* on Trusts (4). Being fixed with knowledge of the trust, and notice that the

(1) 28 Beav. 196.
(2) 7 Ibid. 176.
(3) 33 Beav. 365.
(4) 5th Ed. p. 156.

moneys, of which they constituted themselves borrowers, were trust moneys, they were bound not to part with them for purposes inconsistent with the trust, and could only discharge themselves from liability by paying such moneys into the proper hands pointed out by the trust deed, upon the joint receipt or joint authority of the two trustees.

Mr. *Kay*, Q.C., and Mr. *Horton Smith*, for the Defendants:—

Assuming that the Defendants, by borrowing the trust moneys with notice of the trust, became in any sense constructive trustees, no one can enforce against them any liability greater than that which they undertook when they received the trust money—that of paying back the money with interest at 5 per cent.: *Stroud* v. *Gwyer* (1); *Ex parte Watson* (2); *Vyse* v. *Foster* (3). They have fulfilled their contract by paying back the money with interest, and they were not bound to know the state of the assets, and cannot be made liable for any misapplication of the fund by *J. Ginder*, whose receipt, as one of the trustees and executors, operated as a complete discharge to the Defendants on payment by them of the trust moneys: *Charlton* v. *Earl of Durham* (4). But in any case the claim is barred by delay and acquiescence, as, independently of the evidence to shew that *Grace Lee* knew from the beginning all that was being done and sanctioned the investments, she took no step to dispute it from 1866, when she was furnished by the Defendants with the account, until 1871; and even where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who, after long acquiescence, comes into a Court of Equity to seek that relief: *Beckford* v. *Wade* (5); *Bell* v. *Bell* (6); *Ex parte Hasell* (7).

Mr. *Eddis*, in reply:—

Charlton v. *Earl of Durham* is distinguished, as the money there was personal estate, and paid to the defaulting party as

(1) 28 Beav. 130.
(2) 2 V. & B. 414.
(3) Law Rep. 8. Ch. 309.
(4) Law Rep. 4 Ch. 433.
(5) 17 Ves. 87, 97.
(6) Lloyd & G. temp. Plunk. 44.
(7) 3 Y. & C. Ex. 617.

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executor and not as trustee; and it is expressly stated by Lord *Hatherley* (1), "There are good reasons why the receipt of one executor should suffice, as he may be called upon to pay debts, and this rule therefore prevails until you can fix the debtor with much more precise notice than we have here, that the estate has been all administered." Here the money was the proceeds of real estate devised upon trusts, of which Defendants were fully cognisant, and as the money has been misapplied and lost by the conduct of the one trustee to whom alone it was improperly paid over, the Defendants are in the position of constructive trustees, and bound to make good the loss. The objection of delay does not apply, and in any case cannot prevail, the *cestuis que trust* being, for the most part, married women and infants.

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Jan. 14. SIR JAMES BACON, V.C., after stating the case, and referring to the evidence, continued:—

It is not disputed that the Defendants were employed by and acted as the solicitors of the trustees of *John Lee's* will; that in their characters of such solicitors they received into their hands the purchase-moneys; that they applied part of such moneys according to the trusts of the will with which they were necessarily acquainted; that other part of such moneys was invested by them in temporary securities, pending final instructions from the trustees, or until an eligible permanent investment could be made of it. It does not appear that any such investment was ever made, but the Defendants allege that at various times and in various amounts the whole of the latter sum was paid by the Defendants to *John Ginder* alone, without any further communication with *Grace Lee*. Now the money having been placed in the Defendants' hands by the two trustees, they can only be discharged of such moneys by the joint receipt or by the joint authority of the two persons who had so entrusted the Defendants. The case of the Defendants is, that although they took no such receipt, they acted under the authority of one of the trustees in making such payments as they did make to the other of them. In their answer

(1) Law Rep. 4 Ch. 439.

(par. 8), they say that *G. Lee* left to her brother *J. Ginder*, "the conduct of the business, authorizing us to look upon and act upon instructions from him as joint instructions from her and him together." Upon this matter of fact there is a direct conflict. Not only did *G. Lee* positively deny as well such authority as such knowledge of *J. Ginder's* acts as the Defendants impute to her, but another person (*E. Curling*) present at an interview in the month of August, 1869, between *G. Lee* and *Herbert T. Sankey*, has deposed to the statement addressed to her by the last-named Defendant, "I know you did not give your authority, but I quite supposed you understood it was being done." The Defendants in their evidence, filed several months after the affidavit I have last referred to, do not, in my opinion, effectually contradict the deposition of *Edwin Curling*, for I cannot adopt the general statement in the 4th paragraph of their affidavit of March, 1872, where the Defendant *H. T. Sankey* denies that the conversations deposed to in the Plaintiff's affidavits are correctly stated, as such a contradiction. Weighing the evidence then upon this matter of fact, I am forced to the conclusion that the Defendants have failed to prove that any such authority as they allege was given by *Grace Lee* to the Defendants for making such payments as they did to *J. Ginder*.

The consequence of this conclusion is, that the Defendants are still liable to make good to the trust estate the amount of trust moneys which they received by the authority of the two trustees, and from which they have not been discharged by any act or authority of the same two trustees. It is well established by many decisions, that a mere agent of trustees is answerable only to his principal and not to *cestuis que trust* in respect of trust moneys coming to his hands merely in his character of agent. But it is also not less clearly established that a person who receives into his hands trust moneys, and who deals with them in a manner inconsistent with the performance of trusts of which he is cognizant, is personally liable for the consequences which may ensue upon his so dealing. And upon this latter principle I think the liability of the Defendants is established; for if I were to adopt the allegations of the Defendants, that *G. Lee* had authorized them to act under the instructions of *J. Ginder* (which

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I cannot do, having regard to the evidence I have mentioned), such alleged authority could only be taken as being applicable to the trusts of the moneys which had been deposited with them, "until," as the Defendants themselves say, "an eligible permanent investment could be made of it." There is no trace of any such investment having been made or even proposed, of any communication on that subject having been at any time made to *G. Lee*, nor any explanation of the circumstances under which the various payments were made to *J. Ginder*: the Defendants insisting that it was "no part of their duty to inquire what it was intended to do, or to see what was done, with such moneys." It was at least their duty, as they themselves have stated, to see that the trust funds which they had received went back into the hands from which they had received it, or were applied by the express direction of the persons who, as they say, were the owners of such money; and this, it is clear, they have omitted to do.

It is unnecessary to advert to several topics of defence which were suggested. The *Statute of Limitations*, alluded to in the answer, is no ground of defence; the laches imputed to *Grace Lee* cannot, under the circumstances, be sustained, and could not in any case be alleged against the present Plaintiffs; nor is there any reason for the suggestion which the Defendants make, that the moneys improperly paid to *J. Ginder* were invested by him in the purchase of ships, which after his death were sold by *G. Lee*. It was insisted, upon the authority of *Charlton* v. *Earl of Durham* (1), that the receipt of *J. Ginder* was a sufficient discharge to the Defendants for the moneys which the Defendants had paid to him. No formal evidence has been adduced of any receipt by *J. Ginder*. But, assuming that this might be supplied, the decision referred to cannot govern the present case. The receipt of one executor was in that case held to be sufficient, the subject to which it related being personal estate. The late Plaintiff, *G. Lee*, and *J. Ginder*, although they were executors, were also trustees and acted as trustees, and in no other capacity. The moneys in question were the proceeds of real estate of which they were trustees, and the receipt of one of them alone could not be a sufficient discharge.

(1) Law Rep. 4 Ch. 433.

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I mention these matters only because they were more or less alluded to in the course of the discussion, and not because they have any direct bearing upon the case which is to be decided.

A considerable loss has been sustained; the cause of that loss cannot be imputed to the late Plaintiff *G. Lee*, or to the present Plaintiffs. It must, in all justice, be repaired, and that can only be done by declaring that the Defendants are liable to make good so much of the trust funds which came to their hands as have not been applied according to the trusts of the will of *John Lee*. And for this purpose the account prayed for by the bill must be directed, and the Defendants must be ordered to pay the costs of the suit up to the present time.

Solicitors: Mr. *A. C. Spaull;* Messrs. *Kingsford & Dorman*, agents for Messrs. *Sankey, Son, & Flint, Canterbury.*

DE BRITO *v.* HILLEL.

V.-C. B.
1873
Jan. 23.

[1869 D. 84.]

Practice—Evidence—Order of the 5th of February, 1861, *Rule* 22—*Notice of Examination—Foreign Examination.*

The order of 5th of February, 1861, Rule 22, requiring the party summoning a witness to give to the opposite party "forty-eight hours' notice at least of his intention to examine or cross-examine such witness," will not be applied strictly in the case of an examination taken abroad before examiners specially appointed.

Semble, an objection to a deposition on the ground of irregularity should be taken at the hearing when the deposition is tendered in evidence, and not by motion to take it off the file.

THIS was a motion on behalf of the Defendant that the deposition of the *Condé de Samodaes*, taken under commission at *Lisbon* and filed on behalf of the Plaintiff, might be ordered to be taken off the file.

The suit related to certain transactions in Portuguese bonds; and on the 6th of August, 1872, an order was made for the examination, cross-examination, and re-examination of witnesses on behalf

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of the Plaintiff before two gentlemen, residing at *Lisbon*, as special examiners.

On the 26th of August the Plaintiff's solicitors wrote to the Defendant's solicitors as follows:—"In accordance with the order of the Court for the examination, cross-examination, and re-examination of witnesses in *Portugal* by the commissioners appointed, we intend proceeding to *Lisbon* by the mail leaving *Southampton* not later than the 9th proximo; and within a few days after our arrival we shall proceed with the examination of the Count *Samodaes* and other witnesses resident in *Portugal*, of which we hereby give you notice. If you intend to be present at such examination, we hereby give you notice that it will be taken at such time and place as may be convenient for the witnesses, and of which you can obtain notice from us at the *Hôtel Durand, Largo de Quentilla, Lisbon*, where we shall stay during the time we are engaged upon the commission."

On the 17th of September, 1872, the Defendant's solicitors wrote to the Plaintiff's solicitors:—

"We have not yet received any appointment from the examiners to attend before them on the examination or cross-examination of any witnesses intended to be produced for examination; and as you are aware that we intend to be present on behalf of the Defendant for the purpose of cross-examination and exercising our further rights, we shall require an appointment at such distant time as will admit of our being present. Your Mr. *Merriman*, we understand, has left for *Lisbon*—can you inform us whether he received from the examiners any appointment before he left or since?"

The Plaintiff's solicitors answered on the 18th:—

"In reply to your letter of yesterday's date, we must refer you to our letter of the 26th of August. Our Mr. *Howard Russel* left *London* for *Lisbon* in accordance with the terms of that letter."

On the following day the Defendant's solicitors wrote in reply:—

"Whether the commissioners have appointed any meeting, or have agreed to act under the commission, we are in entire ignorance. It surely must be obvious to you that the commissioners, and not you, are the proper persons to give notice of any appointment, and that we might have gone to *Lisbon* upon your appointment, if

we had been foolish enough to do so, and had our journey and expenses for nothing. We again protest against the course you are adopting, and shall dispute the validity of your proceedings."

It appeared that on the 12th of October, 1872, Mr. *Howard Russel*, the clerk of the Plaintiff's solicitors, obtained an appointment at *Lisbon* from one of the special examiners for Tuesday, the 15th of October, at eleven A.M., at the Bureau of the Finance Minister in *Lisbon*, and that he left a formal notice of the appointment at the *Hôtel Durand*, addressed to the Defendant and Messrs. *Lewis & Lewis*, his solicitors.

Count *Samodaes*, the only witness examined, was examined on behalf of the Plaintiff, in the absence of the Defendant and his solicitors, on the 15th and 16th of October.

On the 29th of October Mr. *Russel* returned to *London*, and on the 2nd of November he gave notice to Messrs. *Lewis & Lewis* that the deposition of the Count *Samodaes* had been filed. In reply Messrs. *Lewis & Lewis* gave notice, on behalf of the Defendant, that they objected to the filing of the deposition, and requested that it be taken off the file, or a promise given that it would not be read in the suit.

The Plaintiff's solicitors having refused to comply with this request, the Defendant moved to take the deposition off the file.

Mr. *Amphlett*, Q.C., and Mr. *T. A. Roberts*, in support of the motion, contended that the deposition was improperly taken, and must be taken off the file, as the Plaintiff's solicitors had not complied with the Order of the 5th of February, 1861, Rule 22, which directs that the party requiring the attendance of any witness "shall give to the opposite party forty-eight hours' notice at least of his intention to examine or cross-examine such witness." This rule has been construed strictly, and held to apply even to *ex parte* examinations where the opposite side had no right to be present: *Ford* v. *Tennant* (1). Although the order contemplated that the Court might "think fit to dispense with such notice," this dispensing power could not be exercised retrospectively after the irregularity had taken place; and in any case the parties sum-

(1) 11 W. R. 275.

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moning the witness could not themselves dispense with the requirements of the order. The Defendant's solicitors desired to attend the examination. They took it for granted, as they had a right to do under the orders, that before going to *Portugal* they should have notice of the time fixed for the examination; but the letter of the 26th of August was only a notice of the Plaintiff's intention to go over to *Portugal* and examine witnesses, and not such a notice as was specified by the 22nd rule—"such notice to contain the name and description of the witness, and the time and place of such examination or cross-examination." The Defendant's letter of the 17th of September called attention to the fact that they had not received any notice to attend; and as the examination did not take place until the 15th of October, the Plaintiff's solicitors had ample time to have given such a notice as would have enabled the Defendant's solicitors to attend.

[The VICE-CHANCELLOR intimated his opinion that the objection to the deposition should be taken at the hearing when it was tendered in evidence, and not by interlocutory motion.]

The objection was properly taken at this stage of the proceedings, as it would be too late (as in the case of evidence taken *de bene esse*) to object to the deposition on the ground of irregularity at the hearing of the cause: *Dan.* Ch. Pr. (1).

Mr. *Kay*, Q.C., and Mr. *H. M. Jackson*, for the Plaintiff, contended that the Court had power to dispense with the forty-eight hours' notice, especially in the case of an examination taken abroad. Even if the Defendant's solicitors had received forty-eight hours' notice of the appointment, they could not have reached *Lisbon* in time for the examination, so that it was impossible to apply the rule to the case of a foreign examination. The letter of the 26th of August gave the Defendant's solicitors every possible information, and if they had acted upon that information, or announced their intention of being present at the examination, they would have received notice at *Lisbon* within the time specified in rule 22.

They offered the Defendant's solicitors an opportunity of cross-examining the witness, but the offer was declined except upon the

(1) Page 822.

terms of having the examination in chief taken again in the presence of the Defendant's solicitors.

Mr. *Amphlett*, in reply.

SIR JAMES BACON, V.C.:—

I think that the application is wrong in form, and that the practice of the Court is misconceived. Assuming that the Defendant has reason to complain of what has been done, it is not, and it never will be, too late to do justice to that complaint. The rule is very plain. The party who is to be affected by the examination is entitled to notice, but in the case of a foreign examination it is quite impossible to apply the rule in its very strictest terms, and it is for that reason, as I read the rule, that the Court has unqualified power to dispense with the notice which in other cases would be required. It is said that the Court must make that order beforehand if it makes it at all. But how can the parties who are going to *Portugal* or elsewhere ascertain, at the time when they get the order for the examination, that circumstances will happen, that a state of things may exist, to make it impossible for them to give the notice which the rule requires? I conceive, therefore, that the power which the Court has of dispensing with the notice is a universal and general power to be exercised according to sound discretion, and that whenever that discretion is invoked, the Court has power to dispense with the notice contained in the order. Whether any such case will happen, it is not necessary for me now to say; but I might be doing irreparable mischief by taking this deposition off the file, having power over the deposition, and having all the inclination as well as all the power to give the fullest effect to any reasonable complaint that the party moving can make. Whoever has to hear the cause will be able, I am sure, to do full justice to the case in that respect, and will not permit evidence to be adduced which ought not to be received without qualification or cross-examination. If the cause were at the hearing, it might be (I do not say it would be) necessary that the cause should stand over till the cross-examination of the witness in question, or of any other witness, might be completed. The party moving, therefore, can be under no disadvantage. There is nothing for him reason-

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ably to complain of. He says that he has a right to have this deposition taken off the file, because the notice mentioned in this order was not given. Whether proper notice was given to him or not will have to be discussed hereafter. In the meantime, and without desiring to anticipate anything, I may say that I find no want of good faith on the part of the person who conducted the examination. A plain notice was given. The letter of the 26th of August, 1872, full and ample in its terms, apprised the Defendant exactly of what the Plaintiff's solicitors meant to do, in the fairest and most regular way that was then practicable. They could not at the time this notice was given fix the day or the time at which the examination would take place. They had no means of ascertaining it, and if there ever can be a case in which the Court should dispense with the forty-eight hours' notice required, it surely would be a case in which it was impossible for the parties to comply with that requisition of the order. The letter assumes the probability, at least, that the Defendant's solicitors would go to *Portugal*, where they would get at the *Hôtel Durand* all the information required as to the particular time appointed. What do they do under those circumstances? There is no answer until the 17th of September. [His Honour referred to the correspondence between the parties.] It is not said that any advantage is gained or intended to be gained; but upon what is called the strict rule of practice I am asked to do what may be irreparable mischief to the persons who have got the examination, and no benefit to the party moving; and at the same time all the rights and advantages which that party could obtain from the examination would be preserved to him by accepting the offer which has been made. It is said that the Defendant has a right to be present at the examination as well as at the cross-examination of the witness, but it is impossible to see what benefit would result to him by having a right to stand by and hear the examination conducted over again. Besides, that would prejudge the question, which at present I cannot deal with. The first examination was, within the powers which the Court possesses, properly taken, and if they were to examine him over again it might be said, You yourselves have taken off the file the first deposition, and supplied another instead of it. Looking at the practice of the Court, and with every desire strictly to adhere to the rules

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which have been referred to, I cannot see any reason why I should entertain this application. I do see that it would be convenient now to make an order which would save the necessity of any discussion upon the subject when the cause comes to be heard—when, as has been said, the result might be to postpone the hearing of the cause in order that the cross-examination might take place. But that is removed by the offer made on behalf of the Plaintiff to produce the witness for cross-examination; and in refusing the application, the offer which has been made will be recited.

After some discussion, the order was made in this form:—

Plaintiff offering Defendant an opportunity of cross-examining Count *Samodaes*, if the offer be not accepted within a week, refuse the motion.

Solicitors: Messrs. *Merriman, Powell, & Co.*; Messrs. *Lewis & Lewis.*

WATSON *v.* COX.

V.-C. B. 1873 Jan. 11.

[1870 W. 57.]

Practice—Rescinding Contract after Decree for Specific Performance—Absconding Defendant.

After a decree for specific performance of a contract to take a lease of a house, and an order on further consideration for payment of the sums certified to be due from him (for costs and damages), Defendant having absconded without paying the amount, the Court, on motion by Plaintiff, ordered the contract to be rescinded and all further proceedings in the suit stayed, except as to the recovery of the sums already ordered to be paid.

MOTION on behalf of Plaintiffs that an agreement dated the 5th of May, 1868 (of which specific performance had been decreed), might be rescinded, and all further proceedings in the suit stayed, except as to the recovery of costs already ordered to be paid.

The Plaintiffs had agreed to grant a lease of a house to the Defendant, and filed their bill for specific performance. On the 22nd of March, 1870, a decree was made for specific performance, with an inquiry as to title and damages. On the 25th of March, 1871, an order was made on further consideration that Defendant

V.-C. B. 1873 WATSON v. COX.

should pay the sums mentioned in the certificate, and that Plaintiffs should execute a lease to Defendant upon payment by him of the costs when taxed and the sums mentioned in the certificate. The Defendant had absconded without paying the amount ordered to be paid by him, and the object of the present motion was to get rid of the contract so as to enable Plaintiffs to find a tenant for the house.

Mr. *G. W. Lawrance*, in support of the application, cited *Foligno* v. *Martin* (1); *Sweet* v. *Meredith* (2).

Sir James Bacon, V.C., made the order.

Solicitors: Messrs. *Pawle & Fearon.*

(1) 16 Beav. 586. (2) 4 Giff. 207.

In re BUCKLAND.

C. J. B.
1873
Jan. 27.

Bankruptcy Act, 1869, ss. 6, 59, 65, 80, *sub-s.* 6, *s.* 82—*Bankruptcy Rules*, 1870, rr. 26, 36—*Irregularity—Proceedings commenced in wrong Court—Refusal to register Resolutions—Jurisdiction.*

A petition for liquidation was by mistake presented by a debtor to the wrong Court. A receiver was appointed, and all proceedings were carried on with perfect regularity till just before the second meeting of creditors, when the error was discovered. At the second meeting a resolution was passed transferring the proceedings to the proper Court. The Registrar refused to register the resolution, on the ground that the proceedings were a nullity. On appeal:—

The Registrar was directed to register the resolutions, and the proceedings to be transferred to the proper Court.

THIS was an application that an order made by the Registrar of the County Court at *Greenwich* on the 29th of November, 1872, whereby the registration of a special resolution passed at a general meeting of the creditors of *W. T. Buckland*, the debtor in the matter, held on the 21st of November, was refused, might be discharged, and that it might be ordered that the said County Court should register the above resolution.

The debtor, *W. T. Buckland*, filed his petition for liquidation or composition on the 22nd of October, 1872. A receiver was appointed, and at the first meeting of creditors, held on the 7th of November, resolutions were passed for accepting a composition. The second meeting of creditors was held on the 21st of November, and between the two meetings it was discovered that the debtor resided beyond the limits of the district.

He resided in the *New Cross Road*. In a list published by the Queen's Printers, *New Cross* was given as in the district of the *Greenwich* County Court, but the district ended where the *Croydon Road* crossed the *New Cross Road*, and the debtor lived beyond the limit, and in the district of the *London* Bankruptcy Court.

At the meeting of the 21st of November the creditors resolved on a liquidation by arrangement, and passed a further resolution for the transfer of the proceedings to the *London* Bankruptcy Court. This resolution the Registrar of the County Court refused

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to register, on the ground that the whole proceedings were a nullity.

The Hon. *A. Thesiger* now moved that the Registrar might be directed to register the resolutions. He cited the judgment of Chief Justice *Bovill* in *Revell* v. *Blake* (1). He referred to Rule 32 of the *Bankruptcy Rules*, 1870, requiring the statements in a bankruptcy petition to be verified at the commencement of the proceedings. That was the time when any objections should have been raised. He also referred to the *Bankruptcy Act*, 1869, s. 80, sub-s. 6, that every Court having original jurisdiction shall be deemed the same Court; and, sect. 83, that irregularities shall not invalidate any proceedings.

SIR JAMES BACON, C.J.:—

It is clear that all the proceedings up to the time when the mistake was discovered were perfectly regular, with this exception, that by reason of the line of demarcation between the districts being drawn in the manner described, the residence of the debtor was without the district of the County Court. The question is, whether, on this ground, I can treat all the proceedings which have taken place as a mere nullity; and I cannot do so. Various proceedings have been taken, meetings have been held and resolutions passed, and all the reasoning in the judgment in the case of *Revell* v. *Blake* seems to apply here. The Court has taken possession of the case, and the creditors now desire to proceed with it, and to transfer the proceedings to the *London* Bankruptcy Court; and why should they not do so? The Act might have been expressed in more distinct terms, but the proceedings take place under the jurisdiction of the County Court at *Greenwich* until the Registrar discovers what was not before discovered, that the debtor lives out of the County Court district. I do not think that is a reason for declaring the proceedings a nullity; and if not, the resolutions should be registered, and the proceedings transferred; and I do not feel any difficulty in making the order. Nobody has objected to that course; if anybody should object—and I think it is right and proper to contemplate that case—I do not think, after

(1) Law Rep. 7 C. P. 300, 310.

the proceedings which have taken place, that such an objection could be maintained; and if not, this transfer should be made.

I therefore direct the Registrar to register the resolutions, and order that thereupon the proceedings be transferred.

I should mention that rule 32 refers to a bankruptcy petition alone, but the whole body of rules form but one code, and I find there that the statements in the Petition should be carefully investigated on its first presentation. The remarks made in *Revell* v. *Blake* (1) on the subject apply, therefore, in this case with not less force than in that.

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Solicitors: Messrs. *Linklater & Co.*

Ex parte HARDING. *In re* FAIRBROTHER.

C. J. B. 1873 Feb. 1.

Bankruptcy—Reputed Ownership—Order and Disposition—Bill of Sale executed before, but registered after, the filing of a Petition for Liquidation—Possession of Grantor to continue till Default in Payment on Demand—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 15, *sub-s.* 5.

5 Ch D 742
18 Ch D 38
21 Ch D 573

A bill of sale was executed on the 9th of January, 1872. On the 23rd of January the grantor filed a petition for liquidation. On the 30th of January the bill of sale was registered, and on the 12th of February the trustee under the liquidation took possession of the property. The bill of sale provided that the grantor should continue in possession of the property until default in payment upon demand of what should be due to the grantee. The grantor remained in possession of the property until the 12th of February, no demand for payment or possession having been made by the grantee. On that day the grantee authorized an agent to take possession, but no possession was taken by him:—

Held (reversing a decision of the County Court Judge at *Manchester*), that the trustee was entitled to the property as against the bill of sale holder.

Goods comprised in a bill of sale, which entitles the holder to take possession upon default in payment after demand, remain, notwithstanding the registration of the bill of sale, until demand is made in the reputed ownership of the grantor.

Observations upon *Ashton* v. *Blackshaw* (2), and *Ex parte Homan* (3).

THIS was an appeal from a decision of the Judge of the County Court at *Manchester*.

(1) Law Rep. 7 C. P. 300, 310. (2) Law Rep. 9 Eq. 510.
(3) Law Rep. 12 Eq. 598.

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On the 9th of January, 1872, an indenture was executed between *Christopher Fairbrother*, a beerhouse keeper, of the one part, and his brother *James Fairbrother* of the other part. This deed contained recitals that *James Fairbrother* had, on the 2nd of January, 1872, advanced to *Christopher* £20, and had at the same time, at his request, entered into a written guarantee with *John Shipley* to secure the payment of £38 due to him by *Christopher*, and that *Christopher* at the time of such advance agreed with *James* to secure the payment of the £20 and the £38 in manner thereinafter appearing; and it was witnessed that, in pursuance of the agreement, and in consideration of the advance of the £20, and of the guarantee having been given, *Christopher* covenanted with *James* that he, his heirs, executors, or administrators, would on demand pay to *James*, his heirs, executors, administrators, and assigns the sum of £20, with interest thereon at 5 per cent. per annum, and also would on demand pay to *James*, his heirs, executors, administrators, and assigns, any sum or sums of money which he, his heirs, executors, or administrators, might pay in respect of the guarantee, with interest at the rate aforesaid: And it was thereby also witnessed that in consideration of the premises *Christopher* granted and assigned unto *James*, his executors, administrators, and assigns, all and every the household goods and furniture, stock in trade, plate and plated articles, household linen, books, china, and other household effects whatsoever, horses, carts, saddles, harness, and other accoutrements, and other goods, chattels, and effects, then being or which thereafter should be in or about the dwelling-house occupied by *Christopher*, and his place of business, to have, hold, receive, take, and enjoy the said several premises thereby assigned to *James*, his executors, administrators, and assigns, absolutely. The deed contained a proviso for reassignment in case *Christopher*, his heirs, executors, or administrators, should on demand thereof made in writing by *James*, his heirs, executors, administrators, or assigns, pay the £20, and also all such sums as might have been paid under the guarantee, together with interest thereon respectively. And it was thereby agreed and declared that after default should have been made by *Christopher*, his heirs, executors, administrators, or assigns, in payment of the £20 and other

moneys contrary to the tenor of the proviso, it should be lawful for *James*, his heirs, executors, administrators, or assigns, to seize and take possession of any household goods, furniture, stock in trade, and other goods, chattels, and effects, which should or might from time to time be substituted in lieu of the said household goods and furniture, stock in trade, goods, chattels, and effects, or which should for the time being be found on the premises, and to sell the same, and out of the moneys arising from the sale to pay what should be due on the security: And it was thereby declared that until default should be made in payment of the £20 and other moneys (if any) and interest contrary to the tenor of the proviso thereinbefore contained, or until default should be made in payment of the interest, it should be lawful for *Christopher*, his heirs, executors, or administrators, to hold, use, and possess the premises thereby assigned without any hindrance or disturbance of or by *James*, his executors, administrators, or assigns.

On the 23rd of January, 1872, *Christopher* filed a petition for liquidation by arrangement, and on the 12th of February, 1872, *E. B. Harding* was appointed trustee of his property. On the 30th of January the indenture of the 9th of January was registered under the *Bills of Sale Act*. On the 12th of February the trustee took possession of the goods and chattels comprised in the indenture, and on the same day *James* authorized one *Thomas Wilde* to take possession of them under the bill of sale. No demand for payment was ever made by *James* upon *Christopher*, and there was no attempt to take possession of the property. On the 23rd of February the trustee sold the goods by public auction. *James* applied to the trustee for payment of £59 7*s*. 9*d*., which was the amount due to him under the indenture. The trustee refused to pay, and an application was made to the Judge for an order for payment. The Judge considered himself bound to hold, upon the authority of *Ashton* v. *Blackshaw* (1) and *Ex parte Homan* (2), that the goods were not, when the petition for liquidation was filed, in the order or disposition of *Christopher* as reputed owner with the consent of the true owner, and therefore ordered the £59 7*s*. 9*d*. to be paid to *James*. The trustee appealed.

(1) Law Rep. 9 Eq. 510. (2) Law Rep. 12 Eq. 598.

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1873

Ex parte HARDING. *In re* FAIRBROTHER.

Mr. *Winslow*, for the Appellant:—

The County Court Judge decided against the trustee because he thought that *Ex parte Homan* (1) was an adoption of the dictum of Vice-Chancellor *Malins* in *Ashton* v. *Blackshaw* (2), that the order and disposition clause of the *Bankruptcy Act* does not apply to the case of a registered bill of sale. That this is not the law is shewn by a series of authorities. In *Freshney* v. *Carrick* (3) it was held that a provision in a bill of sale that the grantor should hold the goods until default in payment, was the best evidence that he was in possession with the consent of the true owner. In this case the bill of sale was registered. So, too, in *Reynolds* v. *Hall* (4) and in *Badger* v. *Shaw* (5), it was held that the registration of a bill of sale does not prevent the goods comprised in it from being in the order and disposition of the grantor as reputed owner. *Stansfeld* v. *Cubitt* (6) and *Spackman* v. *Miller* (7) are to the same effect. The dictum of Vice-Chancellor *Malins* in *Ashton* v. *Blackshaw* is clearly inconsistent with the settled law, and it was not necessary to his decision in that case, for there the bill of sale was held void as against assignees in bankruptcy, because it was not registered. As to *Ex parte Homan*, the facts were very different from those of the present case. The bill of sale holder had a right to take possession after the commission of an act of bankruptcy of which he had no notice. He would have no notice of the filing of a petition for liquidation for some days afterwards. In the present case nothing whatever was done by the Respondent till after the trustee was appointed. In the unreported case of *Ex parte Brown*, mentioned in *Robson's* Law of Bankruptcy (8), it was held that the registration of a bill of sale did not prevent the application of the reputed ownership clause. The law is, therefore, clearly in favour of the Appellant. The goods were in the order or disposition of the liquidating debtor as reputed owner with the consent of the true owner at the time when the petition for liquidation was filed, and the trustee is therefore entitled to them.

(1) Law Rep. 12 Eq. 598.
(2) Ibid. 9 Eq. 510.
(3) 1 H. & N. 653.
(4) 4 Ibid. 519.
(5) 2 E. & E. 472.
(6) 2 De G. & J. 222.
(7) 12 C. B. (N.S.) 659.
(8) 2nd Ed. p. 419.

Mr. *Finlay Knight*, for the bill of sale holder:—

It must be admitted that the observations of Vice-Chancellor *Malins* are somewhat at variance with the common law cases. But what His Honour is reported to have said (1) as to *Stansfeld* v. *Cubitt* (2) is consistent with *Martindale* v. *Booth* (3), where it was held that the sheriff could not seize goods though the debtor who had assigned them continued in possession of them. There is nothing in the report of *Ex parte Homan* (4) to shew that the bill of sale holder, when he took possession, had no notice of the petition for liquidation. In that case your Honour distinctly referred to *Ashton* v. *Blackshaw* (5) with approval. The dates in the present case are very similar to those in *Ex parte Homan*. It is very material to look at the dates. Some interval must always elapse between demand and possession. At law it has been held that a demand must be reasonable; time must be given to the debtor to find the money. A great part of the property was furniture, and to that the doctrine of reputed ownership does not apply: *Re Hawkins* (6).

SIR JAMES BACON, C.J.:—

This appeal raises a question with regard to *Ashton* v. *Blackshaw* and *Ex parte Homan*. I think that the decisions in both those cases have been strangely mistaken. The decision of Vice-Chancellor *Malins* in *Ashton* v. *Blackshaw* is clearly in accordance with well established law. My decision in *Ex parte Homan* has been misunderstood. There is probably an error in the report, but if I said what is there attributed to me as to the effect of the decision in *Ashton* v. *Blackshaw*, I should desire to recall it. But my decision in *Ex parte Homan* was clearly in accordance with the law as long established. The main argument in that case was that the execution of the bill of sale was in itself an act of bankruptcy, and my decision turned upon that point. It appears from the report (7) that the bill of sale was executed on the 7th of July, and that on the same day, but afterwards, the debtor filed a peti-

(1) Law Rep. 9 Eq. 517.
(2) 2 De G. & J. 222.
(3) 3 B. & Ad. 498.
(4) Law Rep. 12 Eq. 598.
(5) Ibid. 9 Eq. 510.
(6) 20 W. R. 110.
(7) Law Rep. 12 Eq. 601.

C. J. B. 1873 *Ex parte* HARDING. *In re* FAIRBROTHER.

tion for liquidation. On the 8th of July a demand for payment of the money was made in accordance with the terms of the bill of sale, and, default in payment being made, possession was taken on the same day. The bill of sale was registered on the 19th of July, and the goods were sold on the 18th and 19th of July. The debtor was adjudicated a bankrupt on the 26th of July, the adjudication being founded upon the failure to comply with the requirements of a debtor's summons which had been served on the 2nd of July. There was no suggestion that the creditor, when he took possession, knew of any act of bankruptcy. From the time that possession was taken all question of order or disposition was at an end. The sale took place before the adjudication of bankruptcy, and the transaction was thus completed. The only act of bankruptcy upon which the adjudication was made was the failure to obey the debtor's summons. The case was, therefore, one of a valid bill of sale duly registered and acted upon, and the creditor's title perfected by taking possession and sale before adjudication of bankruptcy or notice to the creditor that any act of bankruptcy had been committed. That was the ground of my decision in that case, and it is clear, from the subsequent case of *Ex parte Brown*, mentioned in Mr. *Robson's* book, that I had no intention of deciding that the registration of a bill of sale prevents the operation of the reputed ownership clause. There is nothing in the decision of Vice-Chancellor *Malins* in *Ashton* v. *Blackshaw* (1) inconsistent with this. In the present case the goods were in the possession of the debtor as reputed owner at the commencement of the liquidation with the consent of the true owner, and the title of the trustee must, therefore, prevail. The order of the County Court Judge will be discharged, and the trustee must have his costs in the Court below.

5 Ch D 743

Solicitors for the Appellant: Messrs. *Phelps & Sidgwick*, agents for Messrs. *Sale, Shipman, & Seddon, Manchester.*

Solicitors for the Respondent: Messrs. *Cowdell, Grundy, & Browne*, agents for Messrs. *Toy & Broadbent, Ashton-under-Lyne.*

(1) Law Rep. 9 Eq. 510.

McKEWAN *v.* SANDERSON.

V.-C. M.
1873
Jan. 28.

[1872 M. 198.]

Plea—Fraudulent Preference—Averments.

A plea that the Plaintiff's claim is founded on a contract giving the Plaintiff a fraudulent preference over other creditors of a debtor in liquidation, must aver that proceedings in the liquidation had commenced or were imminent when the contract was entered into.

PLEA.

The Plaintiff sued as the registered public officer of the *London and County Banking Company.*

The allegations of the bill were to the following effect:—

In May, 1864, *James Sanderson,* the brother of the Defendant, opened an account with the *Holborn* branch of the Plaintiff's bank, and in the usual course of business the bank discounted bills for him.

At the end of August and the beginning of September, 1870, *James Sanderson* was indebted to the bank to the amount of £6800, against which sum the bank held acceptances which they had discounted for him. He was then in difficulties, and proposed to make some arrangement with his creditors for liquidation, and desired that the bank should not prove or put forward their claim against him, or come into competition with his other creditors, or make him a bankrupt, and that they should not, by pressing the other drawers or acceptors, diminish the amount which might be recovered from them. The Defendant was in some way interested in carrying out the arrangements with *James Sanderson's* creditors, and in keeping him out of bankruptcy and diminishing the claims on his estate, and he, in fact, subsequently paid the composition which the creditors agreed to accept in discharge of their debts.

In September, 1870, an arrangement was come to by which the bank were to forbear pressing *James Sanderson,* and the Defendant was to guarantee that the bank should not lose more than £2000 on the account. This arrangement was embodied in a

Bill dismissed with costs hearing 2 & 20 Jy 65 V.C.M.
Liberty to the plts to file under common order for
further time to put in a plea and answer which was
held irregular. 2 & 20 Jy 65 V.C.M.

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McKewan v. Sanderson.

letter addressed to the trustees of the bank and signed by the Defendant.

The letter was as follows:—

"7th Sept., 1870.

"Gentlemen,—Referring to the statement shewing a list of acceptances to the drafts of Mr. *James Sanderson* and acceptances of Mr. *James Sanderson* to various drafts, amounting in the aggregate to the sum of £7218 1*s.* 4*d.*, under discount with your bank, and the various good considerations, I hereby guarantee the bank that the ultimate loss to the bank in respect of the said acceptances and drafts shall not amount to more than the sum of £2000. And I hereby undertake to pay to the said bank, within nine months from this date, such sum as shall be found to be then due to the bank in respect of acceptances and drafts beyond the loss above mentioned, viz., £2000; and I further undertake to sign such further or orther guarantee embodying the terms of this guarantee and arrangement to be settled and approved by our respective solicitors.

"Yours obediently,

"Witness, *A. H. Miller*, "*Geo. Sanderson.*
6, *Old Jewry*, E.C."

In consideration of the guarantee the bank forbore to take proceedings in bankruptcy against *James Sanderson*, or to prove against his estate, and his affairs were liquidated by arrangement with and for the benefit of his creditors. The Defendant proved against the estate for £1149 18*s.* 11*d.* He gave no further guarantee.

Certain dealings then took place between the parties by which the liability on the bills had become reduced to £5175 15*s.* 1*d.*, and certain letters were set forth in the bill in which the Defendant had authorized such dealings, as well as some correspondence in which the bank endeavoured to obtain some settlement of the remaining liability.

The bill then stated that the Defendant alleged some injudicious dealings with the bills, and that the investigation of the truth of his allegations would involve a separate investigation of the facts regarding each bill, and such questions could not be conveniently decided at common law, and that the facts regarding

them were complicated and could not be dealt with except by the Court.

The prayer was for a declaration to the effect that the Defendant was liable to pay the sum of £6896 3*s.* 4*d.*, deducting £2000; and for consequential relief.

The Defendant pleaded to the whole bill. The plea contained the following averments:—

James Sanderson was at the date of the guarantee in embarrassed circumstances, and had a large number of creditors, by whom he was threatened with proceedings in bankruptcy, and in order to avoid such proceedings it was proposed or contemplated by *James Sanderson* that a petition for liquidation under the *Bankruptcy Act* should be presented and a special resolution of his creditors passed, whereby, or by virtue whereof, he might be released from his debts without being adjudicated bankrupt; the proposed arrangement for creditors required for its validity the concurrence in its favour of a certain majority in number and value of the creditors of *James Sanderson*, and such majority in number and value could not have been obtained in face of the opposition of the bank; and the bank threatened and intended to oppose the arrangement proposed by *James Sanderson* for the liquidation of his debts, and in order to get rid of the opposition of the bank as a creditor of *James Sanderson*, he entered into the agreement set forth in the bill. *James Sanderson* had many creditors besides the bank, to whom the arrangement between the bank and the Defendant was not made known before or at the time of its being entered into, and the arrangement was made without their knowledge or consent. The bank, in consideration of the agreement, withdrew or withheld opposition. The Plaintiff, as public officer of the bank, in October, 1871, commenced an action at law against the Defendant to recover the amount alleged to be due to the bank under or by virtue of the guarantee, and had by the declaration claimed, by virtue of the guarantee, £3000. The Defendant appeared, and pleaded to the action that the agreement in the declaration, which was the same as that in the bill, was made between the bank and the Defendant without the knowledge and consent of the creditors of *James Sanderson*, who were to be bound and affected by the

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proceedings in the Bankruptcy Court, and for the purpose of giving the bank a fraudulent preference over other creditors of *James Sanderson* contrary to the form of the statute in such case made. The plea was heard on demurrer on the allegation that it was bad in substance. A judgment was given against the Plaintiff's demurrer and in favour of the Defendant on the plea.

The plea to the bill then pleaded, that under the circumstances the agreement was one made between the bank and the Defendant without the knowledge or consent of the creditors of *James Sanderson*, who were to be bound and affected by the proceedings in the Bankruptcy Court, and a fraudulent preference over other creditors of *James Sanderson*.

Mr. *Glasse*, Q.C., Mr. *Cottrell*, and Mr. *R. Vaughan Williams* (of the Common Law Bar), in support of the plea:—

The only equity alleged by the bill is, that the matter is too complicated for a Court of Common Law. But the Plaintiff in fact only comes to this Court because he has tried and failed at law.

The case, as appearing from the bill and the plea, results in the bank being paid in full, deducting the £2000, and not coming in to vote as to whether a composition should be accepted. It is in effect buying off a creditor who might prevent the arrangement being carried out; and that is what is called a fraudulent preference, whether the creditor is bought off by means of the debtor's estate or otherwise: *Hall* v. *Dyson* (1); and it is open to any one to take this objection to a transaction, even if he is a party to it: *Jackman* v. *Mitchell* (2), or though the arrangement merely gives an additional security to the creditor to be benefited by it: *Ex parte Sadler and Jackson* (3). These cases simply carry out the principle of *Mawson* v. *Stock* (4), and *Mare* v. *Sandford* (5) is a recent case of the same description. A similar plea was also upheld in *Dauglish* v. *Tennent* (6).

[The VICE-CHANCELLOR:—Is it averred anywhere in the plea that any proceedings in bankruptcy had commenced or were im-

(1) 17 Q. B. 785.
(2) 13 Ves. 581.
(3) 15 Ibid. 52.
(4) 6 Ves. 300.
(5) 1 Giff. 288.
(6) Law Rep. 2 Q. B. 49.

minent on the 7th of September, 1870? If such allegations were contained in the bill it would be a ground for demurrer.]

It is immaterial whether there were any bankruptcy proceedings pending or not. If proceedings were pending the Plaintiffs would be part of the statutory constituency for deciding upon accepting the composition. But if not, it was an arrangement such as would leave the bank in the position of a creditor, and yet give them an advantage over the other creditors. Unless the transaction amounted to a purchase of the bank debt by the Defendant, so as to put it out of their power to claim against the estate of *James Sanderson*, it cannot stand, even though no proceedings had commenced.

As the arrangement stands, the indorsers of the bills are prejudiced by it.

Mr. *Cotton*, Q.C., and Mr. *Waller*, for the Plaintiff, were not called upon.

Sir R. Malins, V.C.:—

I think this plea must be overruled. It is a very important case for the bank, and under a different state of circumstances I possibly should have come to a different conclusion.

The transaction as stated by the bill is this: The Plaintiff is the registered public officer of the *London and County Bank*. In the month of May, 1864, *James Sanderson*, who I suppose must have been a trader, opened an account with the *London and County Bank*. In the latter part of 1870 the bank were holders of a great number of bills, of some of which *James Sanderson* was acceptor, of some of which I suppose he was the drawer, and of some of which the indorser. They amounted together to £7218. It seems the bank were uneasy at the state of the account, and threatened proceedings against *James Sanderson* in bankruptcy.

In this state of things *James Sanderson's* brother, the Defendant, says in substance, "You hold these bills, and if you will forbear taking proceedings in bankruptcy against my brother I will guarantee that within nine months, whatever you recover on the bills, you shall not lose more than £2000, and I will pay the whole amount due upon the bills less £2000."

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[His Honour then read the guarantee set forth in the bill and the statements relating to it, and continued:—]

The bill does not state when the liquidation commenced, or whether it was pending at that time, or whether it was done by arrangement long after, though it is plain that there was some kind of arrangement between *James Sanderson* and his creditors afterwards. Then the bill states that the arrangement between the bank and the Defendant at the date of the guarantee was, that the bank were to do what they could to procure payment of the bills from the other persons liable, and that they proceeded in their discretion, and in most part with the concurrence of *James Sanderson* and the Defendant, to realize the bills, and that the claims of the bank against *James Sanderson* were reduced to £5176. Then it states that no payment has been made by the Defendant on account of his guarantee.

[His Honour then stated the effect of the prayer, and continued:—]

It appears by the plea that an action on the guarantee has been brought by the *London and County Bank* against the Defendant in this cause, and that there has been a plea and a demurrer, which demurrer has been overruled. The action, therefore, is now pending on this guarantee. I give no opinion as to whether this is a proper case for law or equity, and I give no opinion as to the law or the equity. That will have to be considered hereafter; but the ground of this plea is that there was an improper arrangement between the debtor and his creditor to the detriment of the other creditors, and the doctrine of this Court is appealed to which was laid down so repeatedly by Lord *Eldon*, and finally in the case, always referred to, of *Jackman* v. *Mitchell* (1). It is a doctrine founded on the soundest principles, namely, that whenever there are proceedings in bankruptcy or insolvency, or any arrangement between a debtor and his creditors generally, and one of the creditors stipulates either for the payment of a greater dividend to him than is paid to the other creditors, or for any collateral advantage whatever, even such as giving the right to purchase a horse, or any advantage whatever not common to the creditors, any payment made will be ordered to be repaid, any

(1) 13 Ves. 581.

security given will be ordered to be given up, and this Court will treat the whole thing as fraudulent against the other creditors; and anything done in favour of the creditor who obtains this advantage will be set aside by this Court. That principle has been frequently acted upon. I refer to *Jackman* v. *Mitchell* (1) because it has been cited, but *Geere* v. *Mare* (2) is a case on the point at law; and finally, it was very much considered by Vice-Chancellor *Stuart* in *Mare* v. *Sandford* (3), which, as well as some other cases, arose under the same bankruptcy as *Geere* v. *Mare*.

Mr. *Glasse* very much relied on the case of *Hall* v. *Dyson* (4), which certainly goes on the very broad principle that whenever any bankruptcy proceedings are commenced, even although the person getting the advantage has not been a party, the principle must apply, and he would fail in attempting to assert his right to any security which he might have secured.

If therefore in this case, on the 7th of September, 1870, when this guarantee was given, there had been any pending proceedings in bankruptcy or liquidation, I do not express any opinion what the result would have been, because I have not heard Mr. *Cotton* or Mr. *Waller*; but this bill being met by plea the pleader is bound to aver facts which are a bar to the Plaintiff's bill; and in order to bring this case within the doctrine of *Hall* v. *Dyson*, it is absolutely necessary that it should appear before the Court that there were proceedings pending at that time, or that they were so imminent that they might be considered as virtually pending. I therefore asked counsel to point out any averment in the plea that there were any proceedings of the kind so immediately after the guarantee, that I could consider the guarantee a violation of the rights of creditors. There is no such averment, and for all that is averred, it may have been two years before any proceedings were taken to make an arrangement between *James Sanderson* and his creditors. I confess I think it most probable, if I were to go upon conjecture, that it was so; because I infer that the *London and County Bank* were the largest creditors, and the Defendant, for considerations which were valuable to him at that time, namely, for the purpose of rescuing his brother by entering

(1) 13 Ves. 581.
(2) 2 H. & C. 339.
(3) 1 Giff. 288.
(4) 17 Q. B. 785.

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into this guarantee, probably did postpone the evil day and enable him to go on for a considerable time.

The plea is therefore totally wanting in the only averment which could be a defence to the suit, and on that ground I think the Defendant fails to bring his case within any of the authorities which have been referred to, and the plea must be overruled.

Solicitors: Messrs. *Deane & Chubb;* Mr. *J. R. Miller.*

V.-C. M. 1873 *Feb.* 21.

In re NATIONAL EQUITABLE PROVIDENT SOCIETY.

WOOD'S CASE.

Company — Conditional Application for Shares — Allotment—Contributory—Damages—Costs as between Solicitor and Client—Companies Act, 1862, *s.* 35.

A. signed an application for shares in a company upon condition that he should be appointed secretary, and his acceptance of the office was to be subject to further inquiries, which he had caused to be made respecting the position of the company. The shares were allotted the next day, but *A.*, in consequence of information he received, declined the appointment, and required that the allotment should be cancelled. The company was wound up voluntarily, and *A.'s* name was placed on the list of contributories:—

Held, that the application for shares was conditional, and the condition not having been fulfilled, *A.'s* name must be removed from the register and list of contributories, and as he had been placed there without any justification, he must receive costs as between solicitor and client by way of damages, under sect. 35 of the *Companies Act*, 1862, for the extra expenses incurred by him.

THIS was a motion on behalf of *Henry Richard Hugh Wood*, of *Birkenhead, Chester*, that his name might be removed from the register of members in the *National Equitable Provident Society, Limited*, in respect of 120 shares.

The company was registered in September, 1869, having for its object the receipt of deposits of moneys at interest, to be employed in loan transactions, and on the 25th of November, 1872, a resolution was passed for winding up the company voluntarily, and Mr. *William Slater* was appointed liquidator for the purpose.

The applicant, *Henry R. H. Wood*, stated in his affidavit that he

had been a lieutenant in the navy, but left the service in 1871. In October, 1871, being desirous of obtaining some employment on shore, he inserted an advertisement in a newspaper, and received an answer from *John Wall*, the then secretary to the above society, stating that he was about to retire, and that the society wanted a secretary in his place. In consequence of this communication he appointed to go to *Leicester* on the 18th of December, 1871, to meet Mr. *Wall*, and to ascertain the nature and position of the society. Upon arriving at *Leicester* from *Birkenhead* he was met by Mr. *Wall* and the manager of the company, who resided together, and who invited him to dine with them. After dinner the books of the society were shewn to him, from which he was unable, by reason of his inexperience of business, to obtain any useful information. He was given to understand that if he accepted the post of secretary to the society he would be required to take 120 shares of £5 each, which would bear a guaranteed interest of 7 per cent., and that he would have a progressive salary commencing at £100 per annum. Mr. *Wood* informed Mr. *Wall* and the manager that he should not make up his mind as to accepting the situation until he had seen a gentleman named *Hobson*, who resided in *Leicester*, and to whom he had a letter of introduction. He was detained so long at the office of the society that when he called upon Mr. *Hobson* that gentleman had left his office for the day. He however left a letter for him, requesting him to examine the books of the society on his behalf, and he then returned with Mr. *Wall* and the manager of the society to their office, when they produced a document for him to sign, which he understood to be an agreement to take shares to the amount of £600 if he became the secretary. After being much pressed upon the subject he at length signed the paper on the distinct condition and understanding that it was not to be made use of unless, after hearing from Mr. *Hobson*, he should accept the secretaryship, and that he would communicate his decision as soon as he had heard from Mr. *Hobson*. He then proceeded to the railway station accompanied by Mr. *Wall* and the manager, and returned to *Birkenhead* the same night.

On the 20th of December he received from Mr. *Wall* the following letter:—"Dear Sir,—I enclose you notice of allotment for the

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120 A shares you applied for yesterday, and by this post I forward you agreement; if it meets with your approval, please sign and return it, and I will forward you a copy in due course." Enclosed in this letter was the notice of allotment and the agreement, and by these he learnt for the first time that, in violation of his agreement, the document he had signed had been made use of for the purpose of allotting him 120 shares in the society. Mr. *Wood* on the same day received from Mr. *Hobson* a letter, stating that he had been to the office of the society, and had made inquiries, and found that their capital was between £2000 and £3000; that they borrowed money at 7 per cent., and lent it out in small sums at 12½ per cent., so that their net profits could not be more than £100 per annum, and under these circumstances they would not be able even to pay his salary, and he advised him to have nothing whatever to do with the society. On the 26th of December, Mr. *Wood* wrote to Mr. *Wall*, declining the appointment of secretary to the society, and requesting that the allotment of shares might be cancelled. To this Mr. *Wall* answered, on the 27th of December, by the following letter:—"Dear Sir,—I cannot cancel your shares after notice of allotment has been sent. Your shares were applied for conditionally that we appointed you, which we are prepared to do, and as the time expires to-morrow on which you agreed to pay them, you will please forward cheque for the amount, when the warrants shall be forwarded you."

Mr. *Wood* then consulted his solicitors, Messrs. *Frodsham & Nicholson*, of *Liverpool*, who on the 29th of December, 1871, wrote to Mr. *Wall*, demanding that the allotment of shares should be immediately cancelled, in default of which they would hold the directors, manager, and secretary, responsible for all damages and expenses caused to Mr. *Wood* by their refusal. No answer was received to this letter, and Mr. *Wood* believed that the allotment had been duly cancelled until he received a letter on the 7th of December, 1872, with a notice from Mr. *Slater*, the liquidator, informing him that he was included in the list of contributories of the society, and a demand for payment to him within ten days of the sum of £600 in respect of the 120 shares so allotted improperly to him.

Mr. *Wall*, by his affidavit, after setting out the application by

Mr. *Wood* for the appointment of secretary, which he said was made in answer to an advertisement by him, and not in consequence of an advertisement inserted by Mr. *Wood*, stated that when Mr. *Wood* examined the books of the society he expressed himself satisfied therewith, and he signed the application for shares without any condition being specified that it was to be subject to what he should hear from Mr. *Hobson*; that Mr. *Wood* had expressed his satisfaction at being appointed secretary, and had requested the letter of allotment and the agreement to be forwarded to him to sign; that he, Mr. *Wall*, being duly authorized to allot shares, had filled up the letter of allotment to Mr. *Wood*, and had sent it to him in the ordinary course of business.

This evidence was confirmed by Mr. *Clark*, the manager of the company.

Mr. *Higgins*, Q.C., and Mr. *Dryden*, in support of the motion :—

This is a purely voluntary winding-up of the company, and is therefore not affected by the decisions in cases of winding-up under the direction of the Court. We have three grounds of objection to the name of Mr. *Wood* being placed upon the list of contributories. In the first place, there was no application for shares in which the company was entitled to act. The application was entirely conditional upon Mr. *Wood* accepting the office of secretary.

Secondly, we say that Mr. *Wood* repudiated the allotment of shares before his name was placed upon the register of shareholders; and, thirdly, we say that there was no binding allotment of shares; the allotment paper was merely filled up by the secretary, and this was done before there was time for any meeting of the directors to be held, or any formal allotment to be made. This case is not bound by the decision in *Oakes* v. *Turquand* (1), because there has been no order made for winding up the company. All these transactions took place before the 27th of November, 1872, when the resolution was passed for the voluntary winding-up of the company. We say, moreover, that Mr. *Wood* was induced by trickery and undue influence to sign the application for shares, and that the Court must set the whole affair aside.

(1) Law Rep. 2 H. L. 325.

V.-C. M. 1873 WOOD'S CASE.

Mr. *Cotton*, Q.C., and Mr *Ince*, for the liquidator:—

The question upon this motion is one of fact, whether or not the appointment was made conditionally upon Mr. *Wood* being appointed secretary; but even if it were conditionally, we were ready to perform the condition. However, the evidence of Mr. *Wood*, which is entirely unsupported, is contradicted by Mr. *Wall* and the manager of the company. His subsequent repudiation of the shares does not affect the question, since the allotment was actually made, and we shew by the evidence that the secretary, Mr. *Wall*, was duly authorized by the directors to fill up the allotment paper. This question is therefore concluded by the decision in *Oakes* v. *Turquand* (1), before the House of Lords; but, under any circumstances, it was the duty of Mr. *Wood* to take proceedings to have his name removed from the register. All that took place was that his solicitors wrote to the company upon the subject, but no further step was taken, and the liquidator, finding his name upon the register, was justified in placing him on the list of contributories.

SIR R. MALINS, V.C.:—

I not only do not disbelieve Mr. *Wood's* statement, but I believe every word he has sworn by his affidavit to be strictly correct, and upon that statement I think I am bound to disbelieve, and do disbelieve, as far as it is necessary for me to do so, the witnesses who have made affidavits on the other side. However, it is not necessary for me to refer to that, because the transactions plainly shew that this young man has been imposed upon; and I am very sorry to find that the liquidator, who has only an official duty to perform, should have thought it any part of his duty to interfere to fix upon this young man liability on account of the fraud which has been committed upon him.

Now, what are the transactions in this case? Here is a gentleman who has been in the navy; he has command of a few hundred pounds and wants employment. Whether he advertised for employment himself, or answered the advertisements of the society, does not matter; but they offer to him a situation of £2 a week.

(1) Law Rep. 2 H. L. 325.

They issue an advertisement, not for the *bonâ fide* purpose of getting a secretary, but, as I believe, for the purpose of inducing some unwary person upon whom they could impose, to advance his capital under the colour of giving him employment. This gentleman, deceived by the letters or advertisements—I care not which—of this society, goes from *Birkenhead* to *Leicester* on the 18th of December, 1871. Of course it is part of the scheme to make his visit most agreeable to him, so he is met at the railway station by the secretary and manager; they take him to their house; he is hospitably entertained and invited to dinner; he is shewn the books, of which he could form no sort of opinion as to whether they were true or false; and having had his dinner, he is again escorted by these people to the station on his return; but he swears (and I entirely believe what he says) that this Mr. *Wall*, the secretary, and Mr. *Clark*, the manager, did an act which is condemnatory enough of their conduct. Knowing that his sole object was to get employment in this concern, they pressed him on the same day to do that which on no account should they have allowed him to do, namely, to sign an application for 120 shares in this company, which involved the employment of £600. On that subject he says: "Mr. *Wall* and the manager detained me in conversation at the said office for a considerable time, with the design (as I now believe) of preventing my seeing Mr. *Hobson;* and, owing to their so detaining me, it was nearly six o'clock in the evening before I reached the office." Be it borne in mind, they knew he had a letter of introduction to Mr. *Hobson;* they knew that on Mr. *Hobson's* advice he intended to rely; they knew that Mr. *Hobson* was not accessible and not in *Leicester* at that time of day; and knowing that he had not an opportunity of seeing the only person who was to advise him, they did this: they accompanied him to Mr. *Hobson's* office to shew him the way, and returned with him to the office of the society, when they produced a document which they pressed him to sign, and which he understood to be an agreement to take shares in the society to the amount of £600 if he became its secretary. His only object was to become secretary, and the very nature of the transaction shews that the application was conditional. At that time he was disposed to accept the situation if Mr. *Hobson* should advise him to do so; and believing, as he was told, that his signa-

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ture to the document on that occasion would expedite matters in the event of his deciding on taking the situation, and being much pressed by Mr. *Wall* and the manager so to do, he signed the document on the distinct condition and understanding with them that such document was not to be made use of or acted upon unless, after hearing from Mr. *Hobson*, he should accept the secretaryship, and that he would communicate his decision to Mr. *Wall* as soon as he had heard from Mr. *Hobson*. He then proceeded to the railway station, and returned to *Birkenhead* the same night. Mr. *Wall* and the manager accompanied him to the railway station, and the last words he said to them were to the effect that he could not decide until he had heard from Mr. *Hobson*.

Then it appears that on the 20th he had a letter from Mr. *Hobson*, who came to the conclusion, on looking at the books (which was the only conclusion that he could possibly arrive at), that this society never could have any success, and that it could not possibly make more than a profit of £100 per annum, and therefore he advised the applicant to have nothing whatever to do with it. The next thing is that the secretary, who in this was guilty of a most improper act, first in obtaining this application for shares, knowing that it was to be upon the condition, not of their being willing to give him the secretaryship, but of his accepting, writes on the 19th a letter making an allotment to him of 120 shares; and this is the transaction upon which it is sought to fix upon him the liability to stand as a shareholder of this company.

A correspondence is then carried on between the parties. On the 26th, Mr. *Wood* writes a letter declining the appointment, and asking that the allotment of shares may be cancelled. Of course that ought immediately to have been done; but the secretary writes on the next day: "I cannot cancel your shares after notice of allotment has been sent." That is a notice of allotment which never ought to have been sent. "Your shares were applied for conditionally that we appointed you, which we are prepared to do." That was not the condition. It was not the condition that they should appoint him as secretary, but that he should accept the secretaryship, which he never did. What is the proposal they make then? They sent him a draft agreement, by which he

is to have £2 a week, and he is liable to be arbitrarily dismissed at any time they think fit after fourteen days' notice. So that, in consideration of his paying them the £600, a salary of £2 per week is secured to him for only two weeks; the shares are not cancelled, but he is never asked to pay a penny upon them, and then the official liquidator, finding his name upon the list, insists that there it is to stand, and that he is liable to pay the £600. The thing is a fraud and an imposition from beginning to end. I must say it is disgraceful to those who were engaged in it originally, and I cannot say that it is very creditable to any of those who now endeavour to force upon this young man a liability from transactions which commenced in fraud and ended in extortion. In my opinion his name must be erased from the list, and he must have the costs.

Mr. *Higgins*:—We ask that the costs may be allowed as between solicitor and client under the 35th section of the Act of 1862, which is to this effect: "The Court may [upon an application to rectify the register] either refuse such application with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained." This was considered by your Honour in *Pontifex's Case* (1), where Mr. *Pontifex*, having been unjustifiably placed on the register of members, was allowed against the company all his costs of the proceedings in excess of those as between party and party, as well as all preliminary expenses incurred by him, by way of damages under sect. 35 of the *Companies Act*.

Mr. *Ince*:—As regards the liquidator, it does not matter to him, of course, one way or the other; but he is bound to protect the interests of the other shareholders and of the creditors. *Langer's Case* (2) shews the obligation which the liquidator may incur on behalf of other contributories and the creditors; the head-note to that case is as follows:—"When a person agrees to become a

(1) 15 W. R. 955. (2) 37 L. J. (Ch.) 292.

V.-C. M. 1873 WOOD'S CASE.

member of the company, is placed upon the register, and afterwards acts as a shareholder, he cannot resist being placed upon the list of contributories, whatever may have been the circumstances under which the shares were transferred or allotted to him. The transfer being bad as a deed would not affect the question of his liability, nor even dishonest conduct on the part of officers of the company."

Mr. *Higgins*:—That was a compulsory winding-up and this is a voluntary winding-up, and Mr. *Wood* never did consent to become a shareholder.

Mr. *Ince*:—That does not affect the question of costs. What I ask the Court is, what the liquidator is to do with such a case before him, and whether it is quite fair, when the liquidator is brought here by the applicant, to mulct the other contributories and creditors if there are any.

THE VICE-CHANCELLOR:—*Langer's Case* (1) does not go to the question of costs. This is a case in which, in my opinion, the applicant should be completely indemnified in respect of these fraudulent transactions, and he cannot be completely indemnified without having his extra costs paid. As regards creditors, I have not heard that there are any creditors; and I am inclined to think it is an attempt made by the other shareholders to make the present applicant contribute.

I shall give Mr. *Wood* his costs, as between solicitor and client, by way of damages to indemnify him against the consequences occasioned by the extraordinary practices which have been adopted against him.

Solicitors for the Applicant: Messrs. *Chester, Urquhart, & Co.*
Solicitors for the Society: Messrs. *Howard & Co.*

(1) 37 L. J. (Ch.) 292.

ASHBY *v.* SEDGWICK.

V.-C. M.
1873
March 3, 4.

Practice—Costs—County Court Appeal—Successful Appellant.

On an appeal from a County Court the Court has jurisdiction to allow a successful Appellant the costs of the appeal as well as those of the suit in the County Court, and as a general rule will do so.

THIS was an appeal from a decision of the Judge of the County Court at *Watford*.

The plaint was for specific performance of a parol contract to grant a lease of a public-house, and the point in dispute was whether upon the facts, which were somewhat complicated, there was sufficient evidence of part performance to take the case out of the *Statute of Frauds*.

The County Court Judge considered that the Plaintiff had not made out his case, and dismissed the plaint with costs.

The Plaintiff in the County Court appealed.

Mr. *Glasse*, Q.C., and Mr. *Knox*, appeared for the Appellant, and asked for the costs of the appeal as well as those of the County Court.

Mr. *Bristowe*, Q.C., and Mr. *Sangster Green*, for the Defendants, after arguing in support of the decision of the County Court Judge, continued :—

The Court has in no case power to allow to a successful Appellant the costs of an appeal. The case must be treated as on the footing of an appeal in Chancery, in which the costs of the appeal are never allowed: *Denny* v. *Hancock* (1).

Mr. *Glasse* :—That rule is founded on the principle that an appeal in Chancery is only a rehearing. In an appeal proper the costs of the appeal are allowed, but not in a rehearing. County Court appeal cases are strictly appeals, not rehearings: *Schroder* v. *Ward* (2).

(1) Law Rep. 6 Ch. 138. (2) 32 L. J. (C.P.) 150.

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ASHBY v. SEDGWICK.

SIR R. MALINS, V.C., having given judgment in favour of the Appellant on the main question, continued:—

Then as to the question of costs, I entirely subscribe to the view that it is the rule of the Court of Chancery not to give the costs of an appeal. But I thought that even that rule might be departed from in a strong case.

The considerations, however, upon which the rule is based do not apply to the case of a County Court appeal, where the amount in question is necessarily small, and the costs of an appeal would in many instances more than swallow up the amount in dispute. I think, therefore, that it is of great importance, towards securing the right of appeal, that it should be understood that in general where an Appellant succeeds he will have the costs of the appeal as well as those of the suit in the County Court.

Solicitors: Mr. *Field*; Mr. *Camp*.

WHITE *v.* WHITE.

V.-C. B.
1872
Dec. 7.

[1872 W. 157.]

Rectification of Deed—Practice.

A deed was executed purporting (by mistake) to convey a moiety only of real estate, the intention of the parties having been to pass the whole. Infants were interested. Upon bill for rectification:—

Held, that a conveyance of the other moiety by another deed was not necessary, and order made declaring that the deed was, in the particulars after specified, executed by mistake, that it was intended to pass the entirety, and that the deed ought to be rectified, ordering rectification by words and figures accordingly, and directing a copy of the order to be indorsed on the deed.

13 Ch D 348-9

MOTION FOR DECREE.

Prior to the date of the next stated indenture, *John Bazley White* the father was seised in fee simple in possession of a property called the *Swanscombe Cement Works*, in the parish of *Swanscombe*, in the county of *Kent*, subject to a term of twenty-one years from the 1st of January, 1853, which was vested in *John Bazley White* the younger, *George Frederick White*, and *Robert Owen White*.

On the 22nd of May, 1865, an indenture was executed whereby the lands and hereditaments specified in a schedule thereto were granted and confirmed by *J. B. White* the father, and (as to the premises comprised in the term for the purpose of merging the same in the freehold) were granted, assigned, and confirmed by *J. B. White* the younger, *G. F. White*, and *R. O. White*, to a trustee and his heirs, to the use and intent that *J. B. White* the father might thenceforth during his life receive a yearly rent-charge of £2700, to be chargeable upon and issuing out of the premises, and if he should die before the 31st of December, 1872, then that his executors, administrators, or assigns, might receive a yearly rent-charge of £1000 to that date, to be chargeable upon and issuing out of the premises; and subject thereto, to the use of *J. B. White* the younger, *G. F. White*, and *R. O. White*, their heirs and assigns, absolutely, in equal shares as tenants in common.

Amongst the items of property scheduled to this deed was the following, numbered 3, "One undivided moiety or half part or

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share, or one equal moiety or half part or share, of and in all that piece or parcel of land situate and being in the parish of *Swanscombe* in the county of *Kent* . . . . containing by measurement 10A. 2R. 24P. . . . known as the *Swanscombe Cement Works*."

On the 20th of October, 1867, *J. B. White* the father died, having made a will, appointing *J. B. White*, *G. F. White*, and another person executors, and disposing of the £1000 rent-charge as part of the income of his residuary estate.

On the 8th of June, 1872, this bill was filed by *J. B. White*, *G. F. White*, and *R. O. White*, against the executor (other than the two Plaintiff executors) and the beneficiaries under the will, several of whom were infants, alleging that the common intention, agreement, understanding, and belief of *J. B. White* the father and of the Plaintiffs were, that the deed should comprise the entirety of the property called the *Swanscombe Cement Works*; that upon the execution of the deed the Plaintiffs were let by *J. B. White* the father into possession and receipt of the rents and profits of the entirety of the premises; that the rent-charges before and since the death of *J. B. White* the father had been duly paid; that in about April, 1872, the mistake was discovered; that of the persons beneficially interested under the will (all of whom had been made Defendants) those who were competent to consent were willing that the indenture should be rectified; but that, under the circumstances, the deed could not be rectified except under and by the direction of the Court.

The bill then prayed that the indenture might be rectified by omitting from item 3 in the schedule the words referring to a moiety of the *Swanscombe Cement Works*, and by inserting proper words, so as clearly and effectually to pass the entirety.

The prayer of the bill was supported by the affidavits of the Plaintiffs and of the solicitor employed in the preparation of the deed, who explained how the mistake arose.

Mr. *Marten*, for the Plaintiffs:—

In *Stock* v. *Vining* (1) the Master of the Rolls ordered the deed itself to be rectified without a conveyance, and His Lordship

(1) 25 Beav. 235.

authenticated the alteration by signing his initials against the alteration.

In *Squibb* v. *White* (1) the Master of the Rolls appears to have considered it sufficient to order the rectification, and to direct a copy of the order to be indorsed on the deed.

It is submitted that the latter mode is sufficient, and is the proper practice.

Mr. *Rodwell*, for the Defendants:—

It may be doubted whether a conveyance of the outstanding moiety is not necessary after the *dictum* of Lord *Cottenham*, C., in *Marquis of Exeter* v. *Marchioness of Exeter* (2.) There, however, more property had passed than was intended, instead of less, as here.

SIR JAMES BACON, V.C.:—

In my opinion a declaration that the deed ought to be rectified, followed by an order that it be rectified accordingly, will be sufficient to pass the legal estate without a conveyance.

If the parties desire it, I will put my initials to the alteration, as was done by the Master of the Rolls in *Stock* v. *Vining* (3); but I do not consider it necessary, as, in my opinion, the order will be sufficient without more.

The following are minutes of the decree:—

Declare that the indenture dated the 22nd of May, 1865, in the bill of complaint mentioned was, in the particulars hereinafter specified, executed under mistake, and that the same indenture was intended to pass thereby the entirety of the property called the *Swanscombe Cement Works*; and

Declare that the same indenture ought to be rectified by omitting from the item 3 of the third schedule thereto the words referring to a moiety of the said property called the *Swanscombe Cement Works*, and by inserting proper words in the said schedule, so as clearly and effectually to pass the entirety of the said property called the *Swanscombe Cement Works*; and, therefore,

Order that the said item No. 3 of the said schedule to the said indenture be rectified by omitting therefrom the following words, that is to say, "One

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(1) Set. on Dec. vol. i. p. 498, (2) 3 My. & Cr. 321, 326.
(3) 25 Beav. 235.

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undivided moiety, or half part or share, or one equal moiety or half part or share of and in," and by inserting in the said item No. 3 of the said schedule, in lieu of the said words, the words "The entirety of" (and by making similar omissions and insertions throughout the description); and

Let a copy of this order be indorsed upon the said indenture.

Liberty to apply.

Solicitors for the Plaintiffs and Defendants: Messrs. *Thomas & Hollams.*

V.-C. B. 1873 Jan. 30.

In re UNITED PORTS INSURANCE COMPANY.

PERRETT'S CASE.

Unlimited Company—Amalgamation of Limited with Unlimited Company—Form of Application for Shares—Allotment Letter—Alleged Conditional Contract—Acquiescence—Winding-up—Contributory.

8 Ch 1010
4 Ch D. 870

A shareholder in a limited company *A.*, which was being amalgamated with an unlimited company *B.*, received a printed form of application for shares in *B.* company, which he filled up with an application for ten shares, inserting, in writing, after the word "company," the words "if limited." The answer he received in May, 1869, was, that the directors of *B.* company had considered his application and had allotted him ten shares "in pursuance thereof," and had entered his name in the register. On the 1st of June, 1869, he wrote, "Send me certificate for my ten shares in exchange for this allotment letter." The certificates were sent. Nothing more was done until the 6th of November, 1869, when the company was ordered to be wound up.

In the form of application for shares, and in the allotment letter, the *A.* company was always properly described as "limited," and the *B.* company was properly described without that word.

The applicant, upon being settled on the list of contributories, sought to be relieved, on the ground that what he had contracted for were shares in a limited company:—

Held, that the absence of the word "limited" was sufficient notice to the applicant (especially to a shareholder in a limited company) that the company for shares in which he was applying was unlimited; and that the insertion by him of the words "if limited" into the form of application was not effectual in imposing a condition upon the contract:

Held, further, that he had lost any right to relief against the company which he might otherwise have had, by delay and acquiescence.

ADJOURNED SUMMONS.

The *United Ports and General Insurance Company* were incorporated as a company with unlimited liability, by registration, on

the 24th of October, 1868. On the 6th of March, 1869, they, being a marine insurance company, agreed to purchase the business and assets of the *Bristol Marine Insurance Company, Limited*, for a sum of £15,000, of which £5000 was to be paid in cash, and £10,000 in as many shares of £1 each, fully paid up, of the *United Ports Company*.

Amongst the shareholders in the *Bristol* was Mr. *Joseph Perrett*, junior, and to him, amongst others, was sent a printed form of application for shares in the *United Ports*, headed and worded as follows:—

"Shareholders' Form of Application for Exchange of Shares from the *Bristol Marine Insurance Company, Limited*, to the *United Ports and General Insurance Company*, in accordance with the Agreement for Amalgamation entered into between the two Companies, and duly approved at Shareholders' meetings.

"To the Directors of the *United Ports and General Insurance Company*.

"Gentlemen,—I request you will allot me shares in the above-named company of £1 each, fully paid up, and I agree to accept the same, and I hereby authorize and empower you to insert my name in the register of shareholders of the company for the number of shares allotted to me, and I accept the same pursuant to the agreement with the *Bristol Marine Insurance Company, Limited*; and I further hereby declare that I accept the same in full discharge of all claims and demands, subject, nevertheless, to the cash payment, as per agreement, of 10*s*. per share, returnable on the shares held in the *Bristol Marine Insurance Company, Limited*.

"Name in full,

"Address,

"Occupation,

"Place of business (if any),

"Number of Shares held in the *Bristol Marine Insurance Company, Limited*,"

Mr. *Perrett* filled up this form with "10" as the number of shares, and with his name and address as "*Joseph Perrett*, junior, of 9, *Oakland Villas, Redland, Bristol*. He also inserted in writing,

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after the word "company" where it first occurred in the circular, the words "if limited."

The application was laid before a board meeting on the 29th of April, 1869, when it was resolved that the shares should be allotted, and they were allotted.

The following notice was sent to Mr. *Perrett*:—

"No. 93. *United Ports and General Insurance Company,*
"17 & 18, *Cornhill, London,* E.C.,
"20 May, 1869.

"Sir,—The Directors of the *United Ports and General Insurance Company* having considered your application for shares in the said company, have allotted to you ten shares in pursuance thereof, and have entered your name in the register of members of the company as a member of the company in respect of such shares. Certificates for such shares, fully paid up, are now ready for issue in exchange for this allotment letter.

"I am, Sir, your obedient servant,
"*J. Hamer Owens,* Manager.

"Mr. *Joseph Perrett,* Jun.,
"9, *Oakland Villas, Redland, Bristol.*"

Mr. *Perrett* having received this letter, wrote as follows to the manager of the company:—

"9, *Oakland Villas, Redland, Bristol,*
"June 1, 1869.

"Sir,—Please send me certificate for my ten shares in exchange for this allotment letter.

"I am yours truly,
"*Joseph Perrett,* Junior."

A certificate for ten shares was accordingly made out in Mr. *Perrett's* name, and inclosed in a letter addressed to him, which letter was duly posted. The form of certificate was headed "The *United Ports and General Insurance Company,*" and certified that ——— was the holder of ——— shares of £1 each in "The *United Ports and General Insurance Company.*"

Mr. *Perrett's* name was entered on the register as the holder, on the 10th of April, 1869, of ten shares, and so the name remained, without repudiation, or any step taken by or on behalf of

Mr. *Perrett*, until the 6th of November, 1869, when the company was ordered to be wound up compulsorily.

The official liquidator gave Mr. *Perrett* notice of his intention to place his name on the list of contributories, upon which Mr. *Perrett* filed an affidavit, in which he said he had no recollection of the share certificate having been forwarded to him, though immediately on receiving the liquidator's notice he had made diligent search, and could not find that he had any such certificate in his possession. He further said: "If I ever received it, I must have destroyed or thrown it away as useless, considering my application for shares could be accepted in case only the said company was a limited one." He said he never attended a meeting, or in any way intermeddled with the affairs of the *Ports Company*, and always considered that he was "not a shareholder therein."

Mr. *Amphlett*, Q.C., and Mr. *Brooksbank*, for the official liquidator :—

Mr. *Perrett* contends that because he inserted the words "if limited" in the form of application for shares, he is not bound. To that the answer is that the form of application is immaterial. Mr. *Perrett* writes for share certificates, and they are sent to him. That corresponds to what took place in *Lawrence's Case* (1), and *Kincaid's Case* (2), where, as here, no repudiation took place for many months, as also in *Peel's Case* (3).

If, whilst the company was a going concern, Mr. *Perrett* had gone to them to be relieved, he might have succeeded. But the case is different where, having notice in May, he remains on the register till November, when the winding-up order is made. The question then is one between himself and creditors.

It is a fair inference that, when he received these forms and letters, he knew that the company was unlimited.

In *Lawrence's* and *Kincaid's* cases, it was said (as may be said here) that there was no contract, but the argument did not prevail in the face of a shorter period of acquiescence and holding out than has taken place here. In *Heymann* v. *European Central Railway Company* (4) delay of less than four months was held a

(1) Law Rep. 2 Ch. 412, 421.
(2) Ibid. 420, 426.
(3) Law Rep. 2 Ch. 674, 684.
(4) Ibid. 7 Eq. 154.

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bar to relief; in *Taite's Case* (1) it was a period between the 3rd of July and the Long Vacation; in *Peel's Case* (2) it was a longer period.

Mr. *Perrett* must be held to have been cognizant of the provisions of the *Companies Act*, 1862 (ss. 41, 42), with regard to the publication of the name of a limited company, and so to have had notice that the *Ports Company* was unlimited.

Mr. *Everitt*, for Mr. *Perrett*:—

No one can be a shareholder in a company without a clear contract. Here there was none. The question turns on the written documents. Mr. *Perrett* asks for shares in the new company, "if limited," and gets for answer that the directors have "considered" his "application," and have allotted him ten shares "in pursuance thereof." That is not a contract to take and to give shares in an unlimited company. The condition insisted on by the applicant was not complied with: *Reese River Silver Mining Company* v. *Smith* (3). There was an absence of authority, or of sufficient authority, on Mr. *Perrett's* part, to put his name on the register: *Pellatt's Case* (4); *Rogers' Case* (5); *Howard's Case* (6). The directors received a conditional application for shares, and at once sent shares, taking no notice of the condition. This was not a contract; and no amount of acquiescence can make good a contract that was not merely voidable, as in *Lawrence's* and *Kincaid's* cases, but void: *Oriental Inland Steam Company* v. *Briggs* (7).

SIR JAMES BACON, V.C.:—

The question in this case is not merely whether the contract which was entered into between Mr. *Perrett* and the company was conditional or not, but whether, after the conduct he has thought fit to pursue, he can now say that he is not to be treated as a registered shareholder of the company in all respects.

Whether the contract can be called a conditional contract or not depends upon the terms of the documents.

Now, the general law requires that a limited company shall

(1) Law Rep. 3 Eq. 795.
(2) Ibid. 2 Ch. 674.
(3) Ibid. 4 H. L. 64, 80.
(4) Law Rep. 2 Ch. 527.
(5) Ibid. 3 Ch. 633.
(6) Ibid. 1 Ch. 561.
(7) 4 D. F. & J. 191, 197.

not exist unless the word "limited" is annexed to their name; if that word be not annexed to their name they are prohibited from having lawful existence.

In this case, it appears that there was a document which recited in the way of heading and title :—"Shareholders' Form of Application for Exchange of Shares from the *Bristol Marine Insurance Company, Limited,* to the *United Ports and General Insurance Company,* in accordance with the Agreement for Amalgamation;" and was addressed "To the Directors of the *United Ports and General Insurance Company.*" That was the form which was used by Mr. *Perrett,* and into that form, it seems, there were inserted after the word "Company" in the first line the words "if limited." What weight can be attached to an act of that sort, done by a man who is already a member of a limited company properly so called, who has entered into a transaction which he knows, or must be taken to know, is governed by the Companies Acts, and who finds that the *United Ports Company* is not described as a limited company at all? The insertion of the words "if limited" do not, therefore, seem to me to have the slightest meaning or sense, and could not have been so regarded by the company. But that is put beyond all doubt when the terms of the letter of allotment are looked at; it is headed, "*United Ports and General Insurance Company*"—there is no word "limited." The terms of it are, "The directors of the *United Ports and General Insurance Company,* having considered your application for shares in the said company, have allotted you 10 shares in pursuance thereof;" that is to say, "You having put in the words 'if limited,' the company grant shares only in a company which has not the word 'limited.'" They say they do that in pursuance of his application for limited shares. Can anything be more plain than that they did not accept the condition he imposed? They had nothing to allot but unlimited shares, and could not, therefore, give anything else. Then they state further—"We have entered your name on the register of members of the company as a member of the company in respect of such shares." If there was any time at which he ought to have availed himself of the condition, that was the time, because he was then informed—"We, the directors of a company not limited, have agreed to allot you shares in our company not limited, and we put

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your name on the register of shareholders of that not limited company."

But it does not rest there, because on the 1st of June, having this letter of allotment before him, being possessed of all the knowledge it could impart to him, he says—"Send me certificates for my ten shares in exchange for this allotment letter." Can there be a more distinct acceptance of the terms of the allotment letter than is contained in that which I have just read? So that the case, standing on the documentary evidence, disposes of itself; because that the certificates were sent is quite clear from the evidence of the clerk. Mr. *Perrett* does not know what has become of the share certificates, nor do I; but in the meantime, and up to the time of the winding-up, he was the registered owner of these shares; he was entitled to all the benefits which that character could confer upon him, and he knew that the company must be going on contracting debts for which, by law, he was liable.

Without considering, therefore, the question of time, which has been so much argued from *Lawrence's Case* (1) and *Kincaid's Case* (2), and those referred to by Mr. *Everitt*, the case disposes of itself by the documentary evidence alone. If it were otherwise, I should say the time here has been much too long to allow him to complain now; because he cannot now say, "I could not comprehend that letter," when every word in the letter of allotment contradicts any such assumption; and then he waits from June, when he becomes possessed of these certificates—what he has done with them I do not know, and he does not tell us, but that he received them I think must be taken to be proved — till the winding-up takes place, in the month of November, without making any complaint. Therefore he must clearly be on the list of shareholders.

Mr. *Amphlett* said that, unless the Court was of opinion that he ought to do so, the liquidator did not press for costs.

The VICE-CHANCELLOR said he did not think there was any obligation on the liquidator to press for costs, and he would take them out of the estate.

Solicitor for the Official Liquidator: Mr. *A. Pulbrook.*

Solicitors for Mr. *Perrett:* Messrs. *Torr, Janeway, & Co.*

(1) Law Rep. 2 Ch. 412, 421. (2) Law Rep. 2 Ch. 420, 426.

HEATH *v.* CREALOCK.

V.-C. B.
1873
Feb. 8.

[1870 H. 248.]

Practice—Absconding Defendant—Solicitor and Client—Privilege—Client's Address.

The Court will not make an order upon a solicitor compelling him to disclose the address of his client (a Defendant) who has absconded, and whom Plaintiff seeks to serve with a *subpœnâ duces tecum* to compel his appearance at the hearing with documents material to the Plaintiff's case.

THIS was a motion on behalf of the Plaintiffs that Messrs. *Clarke, Son, & Rawlins*, solicitors of the Defendant *Wm. S. Crealock*, might be ordered to disclose to the Plaintiffs the present place of abode of the Defendant, in order that the Plaintiffs might serve the Defendant with a writ of *subpœnâ duces tecum*, or such proceedings as might be necessary to compel him to appear at the hearing of the cause, to give evidence, and to bring with him certain documents in his possession; and that proper directions might be given to the Clerks of Records and Writs, authorizing them to issue such writ or writs, or that an order might be made directing that service on Messrs. *Clarke, Son, & Rawlins*, of the said writ, or other proceedings, might be deemed good service on the said *W. S. Crealock*.

The bill was filed against *W. S. Crealock*, a solicitor formerly carrying on business at *Aberystwith*, who was charged on his own admission with a very grave breach of trust in the appropriation of £3000.

Before the bill was filed *Crealock* absconded, taking with him a mortgage deed and other documents relating to the trust. He had remained abroad ever since, but had appeared and defended the suit and put in a voluntary answer, at which time he was residing at *Ostend*.

The Plaintiffs considered it of importance that *W. S. Crealock* should be present at the hearing of the cause to answer questions as to, and to produce, certain securities referred to in his answer, and believed to be in his possession, and they had applied to his solicitors, Messrs. *Clarke, Son, & Rawlins*, for his address. Messrs. *Clarke, Son, & Rawlins* declined to give up the address of their

Ic at hearing 20 W Ry 215. 10th 22

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client, but offered to consent on his behalf to an order for substituted service, or to send him a copy of the subpœna and urge him to return it with his acknowledgment thereon of having received it. It appeared that on the 19th of January, 1873, *Crealock* wrote to his solicitors stating that he was that day leaving his late abode and should not disclose to them his future residence, so that they might be unable to comply with any order such as was referred to if made. In future they might address any letter for him to *Aberystwith* (his former place of residence), and sooner or later it would probably reach him, though they must not count on an early reply, as it would be very uncertain when it came to hand. He expressly requested them not to disclose his address hitherto, or any other information respecting himself which he had confided to them as his solicitors. If the Plaintiffs' solicitors were so anxious to subpœna him personally, on their undertaking to take no other advantage of him, he would "appoint a place at *Antwerp* to meet any one from your office whom they may select to serve me, on their sending me £10 to cover my expenses to and from that port," or his solicitors might consent to any substituted service in lieu of personal service.

Mr. *Bedwell*, in support of the motion:—

We ask to have an opportunity of serving the Defendant personally with such process as we may be advised for the purpose of bringing him before the Court at the hearing, as substituted service of a *subpœnâ ad testificandum* will not be ordered: *Spicer* v. *Dawson* (1). No question of professional confidence is here involved. A solicitor is not privileged to conceal his client's address; the privilege, if privilege there be, is that of the client and not of the solicitor, and a Defendant who has appeared to and defended a suit has no privilege, under such circumstances as those of this case, to conceal his address, and thus baffle the Court. That a solicitor is not at liberty, in consequence of any privilege, directly or indirectly to conceal any fact which will enable the Court to discover the residence of its ward is settled by *Ramsbotham* v. *Senior* (2); *Burton* v. *Earl of Darnley* (3); and this rule will, it is

(1) 22 Beav. 282.
(2) Law Rep. 8 Eq. 575.
(3) Law Rep. 8 Eq. 576, n.

submitted, apply to the case of any Defendant concealing his address.

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Mr. *Locock Webb*, for the Defendant, was not called on.

SIR JAMES BACON, V.C.:—

There is no evidence that the solicitors, or any one else, know the address of this Defendant, and if they did there would be no obligation whatever on them to disclose it. The cases which have been cited, *Ramsbotham* v. *Senior* (1) and *Burton* v. *Earl of Darnley* (2), have no application, as they both relate to the concealment of wards of Court, and in all such cases a solicitor is bound to give to the Court every information which may lead to the discovery of their place of abode. I can find no precedent for making such an order as is asked, and I must refuse the motion with costs.

Solicitors: Messrs. *Budd & Son*; Messrs. *Clarke, Son, & Rawlins.*

MANSER *v.* MANSER.

V.-C. B. 1873 *Feb.* 8.

[1871 M. 45.]

Practice—Pro Confesso—Service.

Upon evidence that an absconding Defendant, against whom an order had been made for taking the bill *pro confesso*, had not been heard of, that his address was unknown, and that he was believed to be still out of the jurisdiction, the Court dispensed with service upon him of the decree made on the 11th of November, 1872, upon the bill as taken *pro confesso*.

THE bill in this case was filed by *Mary Manser*, widow, against *Philip Manser*, her son, who was sole executor of *John Manser*, testator in the cause.

On the 1st of June, 1871, an order was made under 11 Geo. 4, and 1 Will. 4, c. 36, for taking the bill *pro confesso*, on the ground that Defendant had absconded and was out of the realm, having taken with him part of the assets.

(1) Law Rep. 8 Eq. 575. (2) Law Rep. 8 Eq. 576, n.

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On the 11th of November, 1872, the usual administration decree had been made on the bill as taken *pro confesso*, with a reference to Chambers to appoint a receiver.

Mr. *Colt* now moved to dispense with service on the Defendant of the decree, on an affidavit that nothing had been heard of him, and that it was not known where he was, and that it was believed he was still out of the jurisdiction. He referred to Cons. Ord. XXII. r. 11, and 11 Geo. 4, and 1 Will. 4, c. 36, s. 5, which provides for service upon a Defendant who shall within seven years after the making such decree (*pro confesso*) return, or become publicly visible.

SIR JAMES BACON, V.C., after some hesitation, made an order dispensing with service of the decree on the evidence as it stood, observing that it would have been better for the affidavits to have traversed the words of sect. 5 of the statute.

Solicitors: Messrs. *Sole, Turner, & Turner.*

V.-C. B. 1873 *Feb.* 8.

INMAN *v.* INMAN.

[1872 I. 72.]

Infant—Voidable Transaction—Priority.

An infant charged his reversionary interest in a fund with payment of a sum lent to him upon his promissory note, and executed a statutory declaration stating (untruly) that he was then of full age. After attaining twenty-one he mortgaged his interest in the fund for an amount exceeding what was ultimately available without disclosing the fact of the prior charge:—

Held, that the charge given by the infant during his infancy and incapacity to contract was avoided by the subsequent mortgage executed by him when of full age and capable of contracting, to a mortgagee without notice.

ADJOURNED SUMMONS on behalf of the Plaintiffs *C. W. Inman* and *Edward Flower* that the sum of £316 9*s.* 3*d.* standing in Court to the credit of this cause to "The Account of *C. W. Inman* and his Incumbrancers," be paid to the applicant *Edward Flower* in part discharge of a sum of £400 and interest owing to him by

the applicant *C. W. Inman*, and secured by a mortgage dated the 15th of March, 1872.

The application was opposed by *Robert Morris*, who claimed under a prior charge given by the Plaintiff on the 18th of March, 1870, but it appeared that at the time when such charge was given the Plaintiff was an infant, though he concealed the fact from *Morris*.

Upon the death of his father, the Plaintiff *C. W. Inman* became absolutely entitled under the will of *Charles Inman*, the testator in the cause, to one-fifth share of two legacies of £8000 and £2000.

It appeared that in March, 1870, *Morris*, a bill discounter and money lender in *Waterloo Place*, was applied to by a Mr. *Simpson* to discount for the Plaintiff a promissory note for £125. Being informed that the Plaintiff was entitled to the above-mentioned share payable on the death of his father, then aged fifty-two, and that the Plaintiff had attained twenty-one, *Morris* consented to discount the promissory note upon having a memorandum of charge given to him by the Plaintiff to secure payment of the note and interest, and the usual statutory declaration. The Plaintiff, who was then under age, and a student at *St. Bartholomew's Hospital*, gave his promissory note for £125, with interest at 1*s.* 3*d.* in the pound per month, and gave a memorandum of charge upon all his estate, share, and interest under the will of the testator for securing to *Morris* payment of the note and interest. The memorandum was accompanied by a statutory declaration by Plaintiff that he was of the age of twenty-one years and upwards, having been born at *Melbourne*, in *Australia*, on the 21st of June, 1848; that he was entitled under the will of the testator, as one of the five children of *Robert Inman*, to the share in question payable at the death of his father; and that he had not charged, incumbered, or prejudicially affected his interests under such will. Upon receiving these documents, which bore date the 18th of March, 1870, from *Allen*, his solicitor, who had prepared them, *Morris* drew a cheque for £106 5*s.*, the agreed consideration for the said promissory note, and, according to his affidavit, "the said Mr. *Allen* accounted to the said Plaintiff for the same, as I have been informed and believe." On the 1st of June, 1870, *Morris* discounted for the

V.-C. B. 1873 INMAN v. INMAN.

Plaintiff another promissory note for £150, and took a memorandum of further charge from the Plaintiff.

The two promissory notes for £125 and £150, with interest, not having been paid, *Morris* on the 10th of December, 1870, gave notice to the Defendants, the executors of the will of *Charles Inman*, of his charges, and repeated this notice on the 12th of December, 1871, and the 20th of January, 1872.

On the 5th of October, 1872, notice was given to *Morris* that, in consequence of his claim upon the executors the sum of £316 19*s.* 3*d.*, the balance of the Plaintiff's share (the greater part of which had been paid to him on his father's death), had been paid into Court by them to an account intituled "The Account of Mr. *C. W. Inman* and his Incumbrancers," and that application for payment would be made by *Flower*, an incumbrancer by mortgage dated the 15th of March, 1872.

The Plaintiff attained twenty-one on the 21st of June, 1871. In his affidavit *Morris* stated that at the time he discounted the promissory notes he did not know, nor had he any reason to suspect, that the Plaintiff was under age; on the contrary, assuming that the statement in the statutory declaration as to the age of the Plaintiff was true, he believed that he had attained his majority, and he advanced his money on the faith of the truth of the statement in the statutory declaration. He had never seen the Plaintiff.

The applicant *Flower* stated in his affidavit that when he advanced his money to the Plaintiff and took his security he had no notice or knowledge of any charge or security given by the Plaintiff, and was wholly ignorant of any prior transactions between the Plaintiff and *Morris*. He also stated that on the 14th of February, 1872, he wrote to *C. Inman*, the acting executor and trustee, and also to *W. Inman*, one of the other two trustees, to inquire whether they had notice of any incumbrance by *C. W. Inman* affecting his interest in the funds. No answer was received, and the applicant wrote again, and in a third letter, of the 29th of February, 1872, he gave notice that he should advance the money in a week's time unless he heard in the meantime from the trustees (to whom he should look to make good any loss) that the interest had been incumbered.

Not receiving any answer from the trustees, *Flower* advanced £400 to *C. W. Inman* on the security of a mortgage dated the 15th of March, 1872, after having satisfied himself, by inspecting the baptismal register, that *C. W. Inman* had attained twenty-one.

Mr. *Nalder* (Mr. *Kay*, Q.C., with him), in support of the summons :—

The charge of *Morris*, having been taken from the Plaintiff while he was an infant, cannot prevail against the mortgage to *Flower* executed when he was of full age. In the case of an infant or married woman, fraud does not prevent the incapacity to contract being a defence to an action: *Bartlett* v. *Wells* (1) ; *De Roo* v. *Foster* (2).

Mr. *Freeman*, and Mr. *Fullerton*, for *Morris* :—

If the infant practises fraud, he is liable for the consequences. Having obtained the money upon the faith of his solemn declaration that he was of full age, he has rendered himself liable in equity (though an infant at the time) for the debt so contracted: *Cory* v. *Gertcken* (3); *Lord Teynham* v. *Webb* (4); *Allen* v. *Allen* (5); *Slator* v. *Brady* (6). The law of *England*, whilst it protects the imbecility of infants, still keeps in view that respect which is due to the fair claims and interests of others, and will not allow that which, in the language of Lord *Mansfield* in *Zouch* v. *Parsons* (7), was intended as a shield and not as a sword to be turned into an offensive weapon of fraud and injustice, and therefore an infant conusant of a fraud shall be as much bound as an adult: *Fonblanque's* Equity (8); *Story's* Equity Jurisprudence (9); Co. Litt. (10); *Comyn's* Dig. Infant, E. The privilege of infancy is a legal privilege. "On the one hand, it cannot be used by infants for the purposes of fraud; on the other, it cannot, I think, be allowed to be infringed upon by persons who, knowing of the infancy, must be taken also to know of the legal consequences

(1) 31 L. J. (Q.B.) 57.
(2) 12 C. B. (N.S.) 272.
(3) 2 Madd. 40.
(4) 2 Ves. Sen. 198.
(5) 2 D. & War. 307.
(6) 14 Ir. Com. L. Rep. 61.
(7) 3 Burr. 1804.
(8) Book i. chap. ii. § 4.
(9) § 240.
(10) Page 172 a.

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which attach to it": *Nelson* v. *Stocker* (1). In this case Mr. *Morris* has sworn distinctly that he did not know that Plaintiff was an infant, and advanced his money on the faith of the statutory declaration that he was of full age. An infant may render himself liable for an independent tort: *Burnard* v. *Haggis* (2). Moreover, in this case the contract with *Morris* was one which was voidable and not void. Being voidable at his election when he comes of age, he must, in order to escape from liability, then do some act shewing his intention to repudiate it, and it has been held that a mere plea of infancy without an averment that he repudiates the contract is insufficient: *Leeds and Thirsk Railway Company* v. *Fearnley* (3); *Birkenhead, &c., Railway Company* v. *Pilcher* (4); *Dublin and Wicklow Railway Company* v. *Black* (5). If he does not himself elect to avoid it (and in this case the contract with *Morris* is impeached by a subsequent incumbrancer), no one else can do so for him; a third party, a mere stranger, has no right to say that the infant may not make what contract he pleases: *Douglas* v. *Watson* (6): *Holt* v. *Ward* (7); *Forrester's Case* (8); *Wittingham's Case* (9). They also cited *Ware* v. *Lord Egmont* (10); *Wrout* v. *Dawes* (11).

SIR JAMES BACON, V.C.:—

If I were to yield to the very discursive argument that has been addressed to me, I should be laying down a rule which persons in Mr. *Morris's* condition would very readily avail themselves of. I have nothing to do with a great deal of what has been read from text books, beginning with *Coke* on *Littleton*, and coming down to a very recent time, because the principles are beyond all question. What I have to deal with is the case of a mortgage to Mr. *Flower*, perfectly valid in all respects, made by an adult man, made after inquiry had been made of the trustees, and satisfactorily answered by them. The question is whether that is to have its full force and effect, or whether it is to be

(1) 28 L. J. (Ch.) 760–4.
(2) 32 L. J. (C.P.) 189.
(3) 4 Ex. 26.
(4) 5 Ex. 114, 121.
(5) 8 Ex. 181.
(6) 17 C. B. 685, 691.
(7) 2 Str. 938.
(8) Sid. 41.
(9) 8 Rep. 42 b.
(10) 18 Jur. 371.
(11) 4 Jur. (N.S.) 396, 398.

supplanted and superseded by what is called a charge created by this man at a time when he had not attained his age of twenty-one. I am told he cannot avail himself of his fraud; but it is not he who is seeking to avail himself of his fraud. I am told it was not void in the beginning, but voidable. If it were voidable can there be any more entire avoidance of it than the assignment made in favour of Mr. *Flower?* Mr. *Flower's* evidence is clear and distinct, and open to no kind of impeachment; and unless I am to hold that as against Mr. *Flower*, in whom the interest of Mr. *Inman* is now vested by virtue of the instrument, that interest is taken away from him by virtue of that contract, which, when Mr. *Inman* was incapable of contracting, he entered into with Mr. *Morris*, nothing can be more clear than that Mr. *Flower* is entitled to the benefit of his security, and to payment out of the fund now standing in Court. I have heard nothing which can in the slightest degree affect the principle upon which such matters are regulated. If I were to inquire into what is called faults on both sides, I should be compelled to say that I can find no fault on the part of Mr. *Flower*. If I look at Mr. *Morris's* evidence, and if it were necessary to inquire into it, I cannot say that it inspires me with entire confidence; I cannot say that the payment is proved to have been made in the distinct manner in which it might have been. It is not necessary however, to inquire into that. By a transaction, which if it were not void at first, was avoided by the subsequent mortgage, an infant contracts to make available a certain equitable interest which he then possessed, and at a later period, when he was competent to contract, he does contract with Mr. *Flower*, and does make to him an assignment and transfer of all of his interest. In my opinion the case is clear beyond the possibility of doubt, and, although there is no disputing the authority of the cases which have been referred to, I have not been able to perceive the application of those cases to the present. There must be an order for payment of the money in Court to *Flower*, and the costs occasioned by the summons being adjourned into Court must be paid by *Morris*.

Solicitors: Messrs. *Flower & Nussey; E. G. Lawrence.*

V.-C. B.
1873
Feb. 15.

CLAYDON *v.* FINCH.

[1854 C. 3.]

Practice—Execution of Decrees and Orders—Sequestration—What may be taken—Dividend of Fund in Court.

A dividend of a fund in Court, the income of which had been ordered to be paid to the separate use of a married woman, who was entitled to the same for life for her separate use without power of anticipation, fell due four days before the issue of a writ of sequestration for costs ordered by the Court for Matrimonial Causes to be paid by the married woman. Notice of the issue of the writ having been given at the Paymaster-General's office, payment of the dividend had been refused. Upon petition:—

Held, that the sequestrators were entitled to take so much as necessary of the dividend in satisfaction of their demand.

Petition.

William Simpson, who died on the 22nd of June, 1844, by his will, dated the 16th of September, 1843, devised and bequeathed his residuary real and personal estate as a mixed fund in trust for his children equally. He directed his trustees to invest the share of the fund to which each of his daughters should be entitled, and stand possessed of the investment "upon trust to pay the income thereof as and when the same shall become due, and not by way of anticipation, into the proper hands" of such daughter during her life, free from the control, debts, and engagements of her husband.

Immediately before the next-mentioned date the share under the will of one of the daughters, *Martha E. T. W. Simpson*, was represented by a sum of £6908 9*s.* stock standing in Court to the credit of the cause, the account of such share.

In November, 1870, Miss *Martha Simpson* married *Aubrey Wicks;* and by an order in the cause, dated the 31st of January, 1871, the dividends on the above sum of stock were, on the wife's petition, ordered to be paid to her for her separate use until further order.

In June, 1871, Mr. *Wicks* instituted a suit against his wife for the restitution of conjugal rights, in which he was successful, and

Mrs. *Wicks* was, on the 11th of January, 1872, ordered by the Court for Divorce and Matrimonial Causes to pay the costs, amounting to £49 9*s.* 2*d.* By another order of the same Court, she was allowed to have until the 9th of July, 1872, to pay such sum, together with a further sum of £1 18*s.* 4*d.*, the costs of the order.

On the 5th of January, 1873, a dividend on the fund in Court fell due; but before it was paid out a writ of sequestration was, on the 9th of January, 1873, issued against the real and personal estate of Mrs. *Wicks* for the two sums. Notice of the issue of the writ had been given at the office of the Paymaster-General, and payment of the dividend was in consequence refused.

The sequestrators now petitioned the Court that out of the dividend the taxed costs of the present application, and of and incident to the execution of the writ, and the two above sums and interest, should be paid to them.

The Respondent, Mrs. *Wicks*, opposed.

Mr. *Rogers*, for the Petitioners.

Mr. *Speed*, for Mrs. *Wicks*:—

To make the order asked for would be to supersede the restraint against anticipation.

Dividends on a sum of stock in Court, the receipt of which would be impossible without the order of the Court, cannot be the subject of a sequestration.

In *Fenton* v. *Lowther* (1) a bond creditor moved against the treasurer of the Duke of *Gloucester* to attach the salary of the debtor, who was an equerry in His Royal Highness's service; but Lord *Thurlow*, C., refused. So a motion before Lord *Manners*, C., by a creditor to attach dividends on a sum of bank stock, the property of the debtor, was abandoned, and, as his Lordship said, most properly abandoned: *McCarthy* v. *Goold* (2). In *Johnson* v. *Chippindall* (3) Vice-Chancellor *Shadwell* held it quite clear that the Court could not upon motion, without bill filed, compel the grantor of an annuity to pay into Court arrears of the annuity

(1) 1 Cox, 315.
(2) 1 Ball. & B. 387, 389.
(3) 2 Sim. 55.

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at the instance of Plaintiffs, who had obtained sequestration against the grantee.

Mr. *Rogers*, in reply:—

The cases cited have no application. There is a class of cases, such as *Francklyn* v. *Colhoun* (1), where the sequestrator failed, by reason of conflicting claims on the fund. Nothing of the sort occurs here.

SIR JAMES BACON, V.C.:—

I think the Petitioners are entitled to the order they pray for.

The first objection raised by Mr. *Speed* cannot be maintained. To this dividend the clause in restraint of anticipation has no reference. Such a restriction applies only to income before it becomes due. This dividend was, on the 5th of January, as much the absolute property of Mrs. *Wicks* as if it had been in her own pocket.

If there had been a stop-order on this fund it would have been necessary for the sequestrator to clear the fund before he could lay hands on it. But there is nothing of that sort here; and the authorities clearly establish the right of the sequestrator to be paid out of money which is the absolute property of the debtor.

The order must be as prayed.

Solicitors for the Petitioners: Messrs. *Purkis & Perry*.

Solicitors for the Respondent: Messrs. *Lindsay, Mason, & Greenfield*.

(1) 3 Sw. 276.

DAVEY *v.* WIETLISBACH.

V.-C. W.
1872
Dec. 21.

[1872 D. 183.]

Declaration of Rights of Parties—Direction for Sale of Premises—Further Consideration reserved—Costs.

Where infant Plaintiffs prayed for a declaration that premises were divisible amongst them and a Defendant, and that the costs of the suit might be taxed, and the Plaintiffs' costs declared to be a charge on their shares; for a partition, or sale, and, after payment of the costs, for a division of the proceeds, the Court made a declaration as to the rights of the parties, and directed a sale, but declined to make any order as to the costs until the further consideration of the cause.

Form of decree in *Young* v. *Young* (1) and *France* v. *France* (2) not adopted.

THREE infants, by their next friend, filed the bill in this cause; and they prayed for a declaration that a certain messuage and premises in the bill mentioned were divisible amongst them and the second-named Defendant in equal fourths; they also prayed that the costs of themselves and the Defendants in the suit might be taxed, and that the costs of the Plaintiffs might be declared to be a charge upon their shares in the premises; that a partition of the premises might be made amongst the Plaintiffs and the second-named Defendant; or that the premises might be sold, and the proceeds, after the payment of the costs, divided amongst them; and for consequential relief.

Mr. *Bury*, for the Plaintiffs, stated the facts, and asked for an order similar to that made in the case of *Young* v. *Young* (1), which was followed in the case of *France* v. *France* (2).

Mr. *Rodwell*, for the Defendants.

SIR JOHN WICKENS, V.C.:—

I will make a declaration that the messuage and premises are divisible amongst the three Plaintiffs and the second-named

(1) Law Rep. 13 Eq. 175, n. (2) Law Rep. 13 Eq. 173.

V.-C. W. 1872 DAVEY v. WIETLISBACH.

Defendant, and direct a sale of the property; but I must decline to make any order at present as to the costs. Further consideration must be reserved, and there will be liberty to apply.

Solicitor for the Plaintiffs: Mr. *W. S. Page.*
Solicitor for the Defendants: Mr. *Robinson.*

V.-C. W. 1872 Dec. 16.

In re WILLIAMS' ESTATE. WILLIAMS *v.* WILLIAMS.

[1871 W. 149.]

Administration of Assets—Action against Legal Personal Representative—32 & 33 Vict. c. 46—Specialty and Simple Contract Debts—Judgment Creditor—Priority.

6 Ch D 610
8 Ch D 155
5 C P D 338
16 Ch D 371
20 Ch D 546

By the statute 32 & 33 Vict. c. 46, the distinction between specialty and simple contract debts in the administration of assets of deceased persons is abolished, but a creditor who first takes legal proceedings against the legal personal representative, and obtains judgment, is, though it be not registered, entitled to be paid his debt in full in priority over all other creditors.

Jennings v. *Rigby* (1) followed.

ADJOURNED SUMMONS.

The suit was instituted by a summons for the administration of the personal estate of *James Williams,* who died intestate after the passing of 32 & 33 Vict. c. 46, one of the simple contract creditors having obtained judgment against the administratrix for debt due to him by the intestate.

On the 27th of June, 1871, an order was made on the summons for administration, and another order was immediately afterwards made restraining the judgment creditor, who had obtained judgment on the 23rd of June, 1871, from further proceeding with his action. All the personal estate (£832 6*s.* 4*d.* Consols) had been paid into Court, but it was insufficient for the payment of all the debts and the costs of the suit.

Some of the creditors were specialty creditors under a mortgage deed executed by the intestate.

(1) 33 Beav. 198.

The creditor did not register his judgment at the Common Pleas Office, but claimed priority over the other creditors. The Chief Clerk had not allowed or disallowed the claim, but had simply certified the amounts of all the debts.

Mr. *Morgan*, Q.C., and Mr. *Whitehorne*, for the Plaintiff:—

The question is, whether this judgment creditor has a right to be paid in full in priority to the other creditors, or whether the statute of 1869 (32 & 33 Vict. c. 46), which was passed for the purpose of abolishing the distinction as to priority of payment which then existed between the specialty and simple contract debts of deceased persons, has taken away that right. Prior to the passing of the statute 4 & 5 Will. & M. c. 20, an executor was liable upon any judgment, even if he had no notice of it. To remedy the hardships which executors sometimes suffered that statute was passed. The object of it is fully explained in the cases of *Hickey* v. *Hayter* (1) and *Steel* v. *Rorke* (2). It was intended by that statute to settle all questions between creditors *inter se*. By the 23 & 24 Vict. c. 38, s. 3, it was enacted that no judgment which had not been entered as therein mentioned should have any preference against, *inter alios*, administrators in their administration of intestates' estates; and by sect. 4 it was enacted that no judgment which had been registered under the provisions contained in the 2 & 3 Vict. c. 11, as amended by the 18 & 19 Vict. c. 15, should have any preference against, *inter alios*, administrators in their administration of intestates' effects, unless at the death of the intestate five years should not have elapsed from the date of the entry, or from the only or last re-entry thereof. The language of the statute clearly extends to all judgments, including those of County Courts: *Re Turner* (3); *Williams* on Executors (4).

The statute of 1869 abolished the distinction between specialty and simple contract debts in the administration of assets in this Court; and though the Act is silent as to judgments, yet it is submitted that the language of it applies to all creditors, and has put them upon the same footing: *Landon* v. *Ferguson* (5); *Walter*

(1) 6 T. R. 384–387.
(2) 1 B. & P. 307.
(3) 33 L. J. (Ch.) 232.
(4) 6th Ed. vol. ii. p. 935.
(5) 3 Russ. 349.

V.-C. W. 1872 — *In re* WILLIAMS' ESTATE. — WILLIAMS *v.* WILLIAMS.

v. *Turner* (1). In *Dolland* v. *Johnson* (2) it was held, but with great reluctance, that a registered judgment obtained against the representative of a deceased person had priority, but in this case the judgment has not been registered.

[The VICE-CHANCELLOR :—But for the Act 32 & 33 Vict. c. 46 this case would be clear. There is the case of *Jennings* v. *Rigby* (3), which is against you, for it was there held that judgments against executors need not be registered in order to retain their priority.]

Though the judgment creditor may contend that he is entitled to set that case off against *Re Turner* (4); yet it is submitted that the Court is not bound, looking at the reasoning, to follow that decision. If the Act of 1869 had not been passed a specialty creditor would clearly have had precedence over this judgment creditor. It could not have been intended indirectly to take away this priority, as will be the case if the argument on the other side should succeed; for the object of the Act was not to benefit judgment creditors, and give them a position above specialty creditors, but to benefit simple contract creditors; and certainly this is not a case in which the Court will favour the judgment creditor, who by a mere slip on the part of the Plaintiff has been enabled to obtain this alleged priority, but will distribute the assets of this intestate equally amongst his specialty, judgment, and simple contract creditors.

Mr. *Byrne*, for the Defendant.

Mr. *T. A. Roberts*, for the judgment creditor, was not called upon, but he mentioned the case of *Gaunt* v. *Taylor* (5), upon which the decision in *Jennings* v. *Rigby* was founded.

SIR JOHN WICKENS, V.C.:—

It seems to me that the case of *Jennings* v. *Rigby* is an authority conclusive upon me, and binds me to hold that in the year 1863 an unregistered judgment against an executor had priority in the administration of assets over the debts of all other creditors

(1) 9 L. T. (N.S.) 756.
(2) 2 Sm. & Giff. 301.
(3) 33 Beav. 198.
(4) 33 L. J. (Ch.) 232.
(5) 3 Man. & G. 886; 3 Scott, N. R. 700.

having debts of equal rank with that for which judgment was recovered. But it has been argued that the law has been altered by the statute 32 & 33 Vict. c. 46, and it has been pointed out that if that is not so, a judgment against an executor for a simple contract debt will obtain indirectly priority over specialty debts. That may be an unexpected and unintended consequence of the statute, but it appears to me to be an unavoidable one. The distinction between specialty and simple contract debts is abolished. It was abolished and did not exist when the intestate in this case died; but I can find nothing in the statute to take away that reward for diligence which a creditor is supposed to earn by being first to take proceedings, after the death of the debtor, against the executor, which gives him priority, if his proceedings ripen into a judgment, over all creditors of equal degree, even if they obtain judgment the next day; in other words, I do not think the legal effect of the proceedings taken after the intestate's death by this creditor was intended to be nullified or altered by the statute, which simply, and for certain purposes, and to a certain extent, made the mode in which the debt was contracted by the intestate immaterial. This judgment creditor must be paid in full in priority and with costs, and the costs of all the other parties upon this summons must be provided for out of the estate.

Solicitors for the Plaintiff: Messrs. *Lewis, Munns, & Longden.*

Solicitor for the Defendant: Mr. *Edmund Byrne,* agent for Mr. *R. D. Williams, Carnarvon.*

Solicitors for the Judgment Creditor: Messrs. *Bloxam, Ellison, & Bloxam.*

V-C. W.

1872

Nov. 23;
Dec. 7.

In re LONDON SUBURBAN BANK.

Winding-up—Consent Order—Rectification of Register—Petitions in another branch of the Court—Summons to settle Names removed dismissed.

In March, 1871, *J. W.*, a creditor and contributory of a limited company, the directors of which had power to accept surrenders of shares, presented a Petition for a winding-up order, and on the 29th of May, 1871, on the hearing before *Malins*, V.C., of the Petition, an order was made, as on a motion to rectify the register, by consent of the parties, rectifying the register by removing the names of *J. W.* and others. On the same 29th of May other petitions were presented for a winding-up, and on the hearing on the 8th of July, 1871, *Wickens*, V.C., made an order for that purpose. A summons by the liquidator to settle the name of *J. W.* (a representative case) on the list of contributories was, in consequence of the consent order made by *Malins*, V.C., dismissed.

An *ex parte* application on behalf of another contributory for leave to take proceedings to discharge the consent order was refused.

Adjourned Summons.

John Walmesley was, from its commencement, a shareholder and director of the *London Suburban Bank, Limited.* He paid £100 in respect of his 100 shares on allotment, and afterwards paid two calls of £1 each. In March, 1871, he being a creditor for a large amount as well as contributory, presented a Petition for a winding-up order, and on the 29th of May, 1871, an order was, on the hearing of the Petition before Vice-Chancellor *Malins*, made by consent that the bank should pay to the Petitioner, on the 3rd of June, 1871, the value of certain bonds mentioned, "and the Petitioner and the Respondents (the bank), by their counsel, agreeing that it shall be considered that on the hearing of this Petition a motion to rectify the register of the *London Suburban Bank, Limited*, is before the Court, at the same time it is, by the like consent, ordered that the names of *John Walmesley*," and about ten others, "be forthwith removed from the register of shareholders of the bank." It was, by the like consent, ordered that all proceedings at law by the bank against the Petitioner and the others named, or by any of those persons, against the Petitioner, should be stayed. The record was to be withdrawn, and certain sums (together

£170 10*s.*) were to be returned to the Petitioner. There was no order as to costs, excepting that it was ordered that upon payment of the money, and otherwise carrying out the terms of the order, the Petition should be dismissed without costs.

On the 9th of June, 1871, the bank not having complied with the order, and the Petition having been restored to the paper, the attention of Vice-Chancellor *Malins* was called to the fact of such non-compliance, so far as the removal of the name of *J. Walmesley* from the register was concerned, and after discussion the register was produced in order to satisfy the Vice-Chancellor that the name had been removed, and His Honour directed that all the directions contained in the order of the 29th of May should be complied with, and an undertaking on the part of the bank was given that that should be done.

A third call was made before the order by consent was made. On the same 29th of May two other contributories, who had opposed the said Petition, presented a Petition, and subsequently another Petition by a creditor was presented. These Petitions came on for hearing on the 8th of July, 1871, before Vice-Chancellor *Wickens*, and he ordered the bank to be wound up.

One more call was, prior to the 8th of July, 1871, made. On the 3rd of February, 1872, the liquidator issued a writ against *Walmesley* for the amount claimed and interest; and on the 20th of February, 1872, on a summons taken out by *Walmesley*, Vice-Chancellor *Wickens* ordered the proceedings in the action to be stayed. The liquidator next served *Walmesley* with notice of an appointment to settle his name on the list of contributories for the third and fourth calls. The matter was heard in Chambers, but was, after some discussion, adjourned into Court. The directors had, under the 42nd article of association, power to accept surrenders of shares at any time.

Mr. *Ince*, for the liquidator:—

Upon the facts it is submitted that the order made by Vice-Chancellor *Malins* was without any judicial action on his part; it was a consent order made upon an illegal arrangement which had been come to between the parties, but Mr. *Walmesley* was a member of the company at the commencement of the winding-up

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(25 & 26 Vict. c. 89, s. 84), on the Petitions presented in this branch of the Court, and therefore a contributory (sect. 38) notwithstanding the consent order. This case is much stronger than *Barge's Case* (1), where it was held that the presentation of a Petition rendered the arrangement come to on the same day invalid under sect. 153 of the Act. The consent order was improperly obtained. It was obtained upon a fraudulent agreement come to out of Court, and therefore it ought not to be allowed to stand in the way of the present application to settle Mr. *Walmesley's* name on the list of contributories.

I have another application to make, *ex parte*, that *W. H. Smith*, a contributory, may, if the Court should refuse that in reference to Mr. *Walmesley*, take such proceedings as he may be advised to get rid of the consent order.

[He also referred to *Ex parte Pearson* (2).]

Mr. *Cracknall*, for Mr. *Walmesley*:—

The first objection to this application is that Mr. *Walmesley's* name was actually taken off the register; and, secondly, that this is not an application under sect. 35 to rectify the register. Further, the consent order is a valid one. If it be objected to, the proper course will be to apply to have the Petition re-heard before Vice-Chancellor *Malins*: *Turner* v. *Turner* (3). *Barge's Case* was altogether a different one. *Ex parte Pearson* is in Mr. *Walmesley's* favour. I submit that this application ought to be refused.

Mr. *Ince*, in reply.

Dec. 7. Sir John Wickens, V.C.:—

By this adjourned summons the official liquidator of the *London Suburban Bank, Limited*, asks to place *John Walmesley* on the list of contributories. *John Walmesley*, no doubt, took shares in the bank, and, as a contributory and creditor, presented a Petition to wind it up, which came before Vice-Chancellor *Malins* on the 29th of May, 1871. There was a long discussion, and eventually an

(1) Law Rep. 5 Eq. 420. (2) Law Rep. 3 Ch. 443.
(3) 2 D. M. & G. 28.

order was made dated on that day. That order, which is expressed to be by consent, directs the company to pay *Walmesley's* debt, and proceeds as follows:—[His Honour read the order set forth above within inverted commas.] The order then by consent also stays various proceedings at law, and dismisses the Petition without costs if the terms of the order should be carried out.

On the same 29th of May, 1871, Petitions for winding up were presented in this branch of the Court, on which a winding-up order was made by me on the 8th of July, 1871. The present application is made by the official liquidator in that winding-up. Supposing the order of Vice-Chancellor *Malins* to have been made before these winding-up Petitions were presented, it would, I think, have been open to some remark in point of form, but I am not convinced that it would have been otherwise objectionable. For it seems now (which was not stated, I think, when the winding-up Petitions were before me) that the directors had power to accept surrenders of shares; and though the Court had no jurisdiction, under the winding-up Petition of *Walmesley*, to strike any name off the register, and could hardly give itself jurisdiction by allowing the case to be treated as if there had been a motion under the 35th section, and then striking off the name by consent without any materials for doing so, yet the order may be supported, and was, in fact, intended to be rested, on the directors' power of accepting a surrender. This is a power of which the exercise should be carefully watched, but if it be exercised in good faith, without collusion and openly, after due notice to and with the approbation of the shareholders that remain, its exercise must, *primâ facie*, be supported. Here it was exercised (in so far as it was exercised) under all these conditions in the presence, actual or potential, of the company's creditors, and with the approval of a learned Judge who had before him and had given unusual consideration to all the circumstances of the company. And if the intention was that these shareholders should surrender, and there was power to accept their surrender, I think, putting the second winding-up proceedings out of the question, that they should be held discharged, though the surrender was indirect and informal. Perhaps *Wright's Case* (1), decided by Lord *Hatherley*, may be

(1) Law Rep. 7 Ch. 55.

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thought to support this view. The substance of that case was that when a contributory who was discharged got no more than his right, the fact that he got it in a wrong way was not to be considered by the Court. But the present case is complicated by the commencement in this branch of the Court of effectual winding-up proceedings on the day on which the order by consent was made. Probably that was the earlier in point of actual hours—possibly it was the consequence of the order itself—but I doubt if there are materials before me on which I can judicially hold this. The case seems to me to be one in which the onus is on the person—the official liquidator here—who asserts that the winding-up proceedings in this Court override the order. The Act of Parliament gives, by sects. 153 and 84 combined, a retrospective relation to the winding-up order which nullifies all proceedings taken between the commencement of the proceedings and the winding-up so far as they affect the status of the contributories. This, of course, does not in general affect an order of the Court rectifying the register, which may be made after the winding-up order itself, but it might, and probably would, affect for some purposes (though not so as to prevent its taking effect at its date), an order like the present, which, though in form an order rectifying the register, is in reality an acceptance of a surrender by the governing body of the company. Where, however, as here, the alteration of the list has nothing whatever to do, so far as appears, either directly or indirectly, with the presentation of the Petition, but was an independent act done in good faith, I think that it would be dangerous to hold that the presentation of Petitions on the same day, without proof of priority in hours, nullifies it by the doctrine of relation to which I have alluded. No authority bearing on the case was cited at the Bar, for *Barge's Case* (1) is distinguishable, and indeed the circumstances are so peculiar that a similar case is not likely to have occurred or to occur hereafter. This being so, I must give effect to my opinion as expressed in Chambers, that, in the face of the order of Vice-Chancellor *Malins*, I cannot hold *Walmesley* to be a contributory. The summons to put him on the list will therefore be dismissed, but the costs of both parties must come out of the estate.

(1) Law Rep. 5 Eq. 420.

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There is also an *ex parte* application before me for liberty to take some proceedings or other for the purpose of discharging the order of Vice-Chancellor *Malins*. In my opinion such proceedings would be useless and hopeless, and would do injustice if they chanced to succeed; therefore I refuse this application also. But of this also the official liquidator may have his costs out of the estate; and I intend that this decision in Mr. *Walmesley's* case shall apply to all the other persons named in the consent order.

Solicitors for the Liquidator: Messrs. *J. & C. Rogers & Sons.*
Solicitors for Mr. *Walmesley:* Messrs. *G & A Lindo.*

GRIFFITHS *v.* JONES.

[1871 G. 143.]

L. J. J. for V.-C. W.
1873
Feb. 20.

Vendor and Purchaser—Sale by Court—Valuation of Timber—Mistake—Opening Biddings.

At a sale of an estate by auction under the direction of the Court, *J. E.*, having previously been informed of the value of the timber, purchased lot 2, and agreed to take the timber at the price named by the auctioneer. The Chief Clerk confirmed the sale and filed his certificate. It was subsequently discovered that the value of the timber on a portion of the lot had been, by the mistake of the auctioneer, omitted:—

Held, on summons by the vendors, that the purchaser was entitled to hold the property without submitting to a valuation of the timber.

THIS was an adjourned summons in a creditor's suit. The application was on behalf of the Defendants, vendors, and it was in effect for the purpose of compelling *John Evans*, the purchaser of lot 2, part of an estate situate in the county of *Flint*, and sold under the direction of the Court, to pay into Court a sum of money, in addition to the purchase-money and the interest thereon, the value of the timber on the said lot, such value to be ascertained by valuation. The ground of the application was that a large portion of the timber was, by mistake, omitted in the valuation upon which the amount named by the auctioneer at the sale as the value of such timber was founded. The evidence on the part of the vendors shewed that the timber on 63A. 13P.

L. J. J. for V.-C. W. 1873 GRIFFITHS v. JONES.

of lot 2 had been omitted from the valuation of the timber on the lot, which at the time of sale on the 15th of August, 1872, the auctioneer stated to be £1620. *John Evans* purchased the lot for £11,000, and he said he would take the timber at the price named (£1620).

On the part of the purchaser the evidence, in effect, was that his solicitors asked the vendors' solicitors, a week before the sale, what the valuation of the timber on the lot was, and were told that it would be divulged only at the sale, and that the purchaser would have the option of taking it at the vendors' price or by valuation in the usual way; that the purchaser and a friend went over the property and roughly estimated the value of the timber; that the purchaser on hearing, prior to the sale, the amount of the valuation of the timber, gave a larger sum than he had intended to give for the property; and that £12,620 was the full value of the lot with the timber.

John Evans was the purchaser of other lots of the same estate, and took the timber on all of them at the valuation declared at the sale, though in some instances he was advised it was excessive. The Chief Clerk confirmed the sale, and his certificate was filed long before these proceedings were taken.

Mr. *Greene*, Q.C., and Mr. *Millar*, for the vendors, contended that upon the evidence there ought to be a fresh valuation of the timber.

Mr. *W. C. Harvey*, for a subsequent mortgagee, supported that view.

Mr. *Morgan*, Q.C., and Mr. *A. Thomson*, for the purchaser, referred to the cases of *Morice* v. *Bishop of Durham* (1), *In re Carew's Estate* (2), and *Guest* v. *Smythe* (3); and contended that this was an application analogous to the old practice of opening the biddings, which had been abrogated by statute 30 & 31 Vict. c. 48. No fraud was imputed to the purchaser. The application was founded upon an alleged mistake, but there had been no mistake at all; even if there had been the Court would not rescind the purchase merely on the ground that the vendors had

(1) 11 Ves. 57. (2) 26 Beav. 187.
(3) Law Rep. 5 Ch. 551.

made a mistake by their own agent, the auctioneer. There had been no surprise upon the vendors. They had had plenty of time to make up their minds as to the amount of the valuation of the timber and of the property. The certificate had become absolute before any proceedings were taken, and for these reasons the summons ought to be dismissed.

Mr. *Kekewich*, for the first mortgagee, who wished, if a valuation was not ordered, that the contract should stand as it was.

Mr. *Greene*, in reply, submitted that the argument as to the opening of the biddings had no application to this case. The evidence shewed that the mistake was a serious one, and that the purchaser had a full opportunity of knowing of it; but whether he did know of it or not, he could not be allowed to hold the property without a valuation of the timber, which had been omitted by mistake. All that he could properly claim was to have the purchase rescinded.

SIR W. M. JAMES, L.J.:—

I am of opinion that the relief sought upon this summons cannot be granted. It may be that the agent of the vendors made a mistake as to the amount of the value of the timber on this lot, but it would be very inconvenient if a contract made between vendor and purchaser could, merely on the ground of some mistake by an agent, be set aside. Suppose the purchaser had made a mistake in his valuation of the estate, could I have granted him relief? If I could not do so in that case, why should I do so in this? The lot was sold for £11,000 after the value of the timber was declared, and the purchaser elected to take the timber at the price named, and not to have a valuation. There has been no fraud and no misconduct on the part of the purchaser; and the mistake, if any, was through neglect on the part of the vendors; and it is now quite clear that biddings cannot be opened except for fraud. I must hold that the contract is binding, and dismiss the summons with costs.

Solicitors: Messrs. *Barnard & Harris;* Messrs. *Ashurst, Morris, & Co.;* Messrs. *Frankish & Buchanan;* and Messrs. *Dawes & Son.*

L. J. J.
for V.-C. W.
1873
Feb. 25.

CROZIER *v.* CROZIER.

[1872 C. 119.]

Will—Absolute Gift—Life Estate not implied.

Gift by a testator of all the residue of his estate and effects, real and personal, whatsoever and wheresoever, to his wife, *E. C.*, and after her death, to be equally divided to the children, should there be any; he also appointed his wife sole executrix. There were no children:—

Held, that the wife was absolutely entitled.

SPECIAL CASE.

R. W. Crozier, a Colonel in the Indian Army, by his will, dated the 6th of March, 1862, made the following disposition:—

"I give and bequeath to my nephew and godson, *B. R. Crozier*, the sum of £200. I also give and bequeath to *R. Davis* and *A. Wood*, brother and sister of my wife, each £100. All the residue of my estate and effects, both real and personal, whatsoever and wheresoever, and of what nature and quality soever, I give, devise, and bequeath the same to my wife, *Emily Crozier*, and after her death, to be equally divided to the children, should there be any. I hereby appoint her sole executrix of this my will."

The testator died on the 12th of August, 1871, having had one child only, who was born after the date of the will, but who predeceased the testator. The will was proved by the executrix. A question having been raised as to the interest taken by the executrix under the will, this case was filed, which requested the opinion of the Court whether the executrix took an absolute interest or only a life interest in the real and personal estate of the testator, or in any and what part thereof.

Mr. *Dickinson*, Q.C., and Mr. *Colt*, for the Plaintiff:—

There are two well-settled rules of this Court for construing wills: First, that where there are words conferring an absolute gift, there must be words equally strong and clear to cut it down: Secondly, that where there is a gift over on the happening of an event, the actual event must happen before the gift over can take

effect. Here the gift to the executrix is absolute, and is only to be cut down on an event which has not happened. It follows that the executrix is entitled absolutely.

Mr. *Karslake*, Q.C., and Mr. *Maidlow*, for the next of kin :—

The words of the gift imply that the testator intended only to give a life estate to the executrix. An intention apparent on the will that the legatee should have a life estate only, is sufficient to cut down the gift, however strong the words of gift may be: *Joslin* v. *Hammond* (1); *In re Graham's Will* (2); *Waters* v. *Waters* (3).

Mr. *Lindley*, Q.C., for the heir-at-law.

SIR W. M. JAMES, L.J. :—

I must take the whole of the will together, and not one part separately.

This case bears no resemblance to *Waters* v. *Waters* where the testator interposed trustees. It is more like the case of *In re Graham's Will.*

The testator in this case gives the whole property directly to his wife without the interposition of trustees. It is a direct and absolute gift to her. Then he says, if there should be children the property is to go to them after their mother's death. It is perfectly clear he did not mean to die intestate, but if the widow only takes a life estate there is an intestacy. I am of opinion that the widow takes absolutely, and the question must be answered accordingly. The costs to come out of the estate.

Solicitor for all parties: Mr. *R. B. Wheatly.*

(1) 3 My. & K. 110. (2) 33 Beav. 479.
(3) 26 L. J. (Ch.) 624.

L. J. J. for V.-C. W. 1873 Feb. 20.

In re CLOUGH'S ESTATE.

Leases and Sales of Settled Estates Act—Person of unsound mind not so found by Inquisition—Order made, under s. 36 of Act, appointing a Guardian—Sale of Estate by the Court—Objection to Title by Purchaser allowed.

10 Ch 201-2

On a petition presented under the *Leases and Sales of Settled Estates Act*, an order was made for the sale of an estate to which *A. B.*, a person of unsound mind, but not so found by inquisition, was entitled for life in remainder. *A. B.'s* brother had been previously appointed, under the 36th section of the Act, the guardian of *A. B.* and of certain infants for the purpose of consenting on their behalves to the application, and he was to be at liberty on behalf of the infants to consent. The order for the sale was made upon hearing counsel for *A. B.* by his guardian, and the guardian by his counsel consenting.

The purchaser objected to the title on the ground that only a committee properly appointed could consent on behalf of *A. B.*:—

Held, that the objection was well founded; and a summons taken out by the vendors to compel the payment of the balance of the purchase-money, interest, and the costs, dismissed.

In re Venner's Settled Estates (1) considered.

THIS was an adjourned summons intituled In the matter of *James Henry Clough's Plas Ashpool* Estate, and of the *Leases and Sales of Settled Estates Act* (19 & 20 Vict. c. 120.)

James Henry Clough, who was after the life estate of *Catherine Clough* (since deceased) entitled in fee, by his will devised this estate to trustees upon trusts for his wife (since deceased) for life, with remainder for his daughter (his heiress-at-law) for life, with remainder, in effect, for the use of his eldest grandson, *Thomas Parr Williams-Ellis* for life, with remainder for his sons successively in tail, with remainders over. The testator died in 1848.

Thomas P. Williams-Ellis, now the tenant for life in remainder, was at the time the petition after-mentioned was presented, and indeed had been since February, 1870, a person of unsound mind, though not so found by inquisition. He had five sons and two daughters, all infants. A petition intituled as above mentioned was presented on the 12th of July, 1871. It set forth all the facts, and, *inter alia*, alleged that it would be for the benefit of the parties beneficially interested in this estate that it should be

(1) Law Rep. 6 Eq. 249.

See mem 37, 38 Sch C 33. 52 L Crabtree LR 10 Ch 201

sold and the proceeds applied in payment of the incumbrances, and it concluded with a prayer to that effect, and that the surplus (if any) should be invested in consols.

On the 9th of July, 1872, *John Clough Williams-Ellis* was appointed guardian of his brother *Thomas P. Williams-Ellis* and of certain infants, "for the purpose of consenting on their behalves" to the application. The order concluded thus: "And the said *John Clough Williams-Ellis* is to be at liberty, on behalf of the said infants, to consent to the said application." And on the 11th of July, 1872, an order, upon hearing counsel for, amongst others, *Thomas P. Williams-Ellis*, by his guardian appointed by the Court, as above mentioned, and the guardian by his counsel consenting, was made whereby there were ordered and directed certain accounts and inquiries and a sale of the estate subject to the provisions and restrictions of the Act, and the proceeds to be paid into Court. The estate was, on the 11th of October, 1872, sold by auction under the direction of the Court, and *Peter Anderton* was by the Chief Clerk, on the 31st of October, 1872, certified to be the purchaser of the estate for the sum of £26,500. The purchaser, who had received, on the 22nd of November, 1872, from the vendors an abstract of title, objected to the title on the ground that only a committee properly appointed could consent on behalf of *Thomas P. Williams-Ellis*, and this was a summons on the part of the vendors asking that he might be ordered to pay the balance of the purchase-moneys; a sum of £169 17*s.* 9*d.* for interest thereon; and the costs.

The question was, whether the consent to the order for sale by the guardian appointed by the Court of *Thomas P. Williams-Ellis* was binding upon *Thomas P. Williams-Ellis* as tenant for life in remainder, and sufficient to give validity as regarded him and the other persons interested in the estate to that order.

Mr. *Morgan*, Q.C., and Mr. *A. Thomson*, for the vendors:—

The order for sale was made under the provisions of the *Leases and Sales of Settled Estates Act* (19 & 20 Vict. c. 120.) The 36th section of that Act is, that all powers given by the Act, and all applications to the Court under it, and consents to such applications may be exercised, made, or given by guardians on behalf of the infants, and by committees on behalf of lunatics; and there is

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a proviso that in the cases of infant or lunatic tenants in tail no application to the Court or consent to any application may be made or given by any guardian or committee without the special direction of the Court. The order in this case was made upon the authority of *In re Venner's Settled Estates* (1), and the decision in that case was come to after a consideration of the 36th section of the Act. The words of the section are merely permissive. It was intended to leave each case to the ordinary rules and practice of the Court, which are, that a person of unsound mind not so found by inquisition may sue or defend by his guardian. The case of *In re Venner's Settled Estates* is a proof that the statute has been in the same manner acted upon for several years, and it will be for the benefit of the public that the statute in this particular be not made a dead letter. If the case of *In re Venner's Settled Estates* be overruled, numerous titles will in all probability be upset. On these grounds it is submitted that the order asked for ought to be made.

Mr. *North*, for the purchaser:—

The language of the 36th section is express. Consents to such applications must be given by committees on behalf of lunatics as they must be by assignees of bankrupts or insolvents. As regards committees, they must be appointed by the Court having jurisdiction in lunacy. The order in this case, however, states that *John Clough Williams-Ellis* was appointed guardian of the person of unsound mind, and of infants, for the purpose of consenting on their behalves; and that he should be at liberty, on behalf of the infants, to consent to the application; and consequently the Court did not give the guardian leave to consent on behalf of the person of unsound mind. The 27th and 28th sections of the *Leases and Sales of Settled Estates Act* are very important. By the former the Court is not to authorize any act which could not have been authorized by the settlor; and by the latter the acts of the Court in professed pursuance of the Act are not to be invalidated, except that no lease, sale, or other act "shall have any effect against any person whose concurrence in or consent to the application ought to have been obtained and was not obtained." The words of that section shew that proceedings cannot go on without consents in

(1) Law Rep. 6 Eq. 249.

certain cases, and there is no way of obtaining the consent of a person of unsound mind except by a committee properly appointed. The person of unsound mind should he recover, or the committee should one be appointed, would be able to recover the estate in an action of ejectment, unless it could be shewn that the consent to the sale had been obtained in the manner pointed out by the 36th section. The purchaser wishes to expend a considerable sum of money on the estate, and though he is a willing purchaser, he is unwilling to take a bad title. *In re Venner's Settled Estates* (1) does not apply to this case. If it should be considered that it does, then I contend that the decision was not a right one upon the construction of the 36th section of the Act. It cannot be contended that that decision will bind the Courts of Common Law; and the cases of *In re Turbutt's Estate* (2) and *In re Franklin's Estates* (3), cited in that case, do not bear out the order made by the Master of the Rolls. Those cases were exceptional, and are not of sufficient authority for the order asked. Therefore I submit that the summons ought to be dismissed.

Mr. *Morgan*, in reply:—

Though the order in *In re Venner's Settled Estates* was not made adversely, it is an authority, and has been acted upon, and in this very case. The production of the order shewing the consent by the guardian would be a complete answer in an action of ejectment, for the consent of the guardian is as good as that of a committee. Putting the 36th section of the Act aside, the Court can, under its original jurisdiction, recognise the guardian as the proper representative for all purposes, as if he had been appointed in a suit; and that being so, the consent is of the person of unsound mind himself. But the language of the 28th section of the Act is conclusive, for it says, that "after the completion of any lease or sale, or other act under the authority of the Court, and purporting to be in pursuance of this Act, the same shall not be invalidated on the ground that the Court was not hereby empowered to authorize the same." Then comes the exception which has been referred to, that no sale shall have any effect

(1) Law Rep. 6 Eq. 249. (2) 2 N. R. 158.
(3) 7 W. R. 45.

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against any person whose concurrence in the application ought to have been obtained and was not; but this gentleman's concurrence was (within the meaning of the 36th section) obtained; if it was not, then the case is covered by the general practice of the Court.

Sir W. M. James, L.J.:—

I am of opinion that the objection of the purchaser to this title is well founded. The question in this case has never been before any Court upon an application in which the persons interested have raised it. If there were a decision of any Court shewing that the mode adopted in this particular case had been adopted in other cases as the proper mode, I should consider myself bound by the decision and follow it. I cannot in this case follow the order in *In re Venner's Settled Estates* (1). By reliance on that case the parties here have, on my view of it, been led astray. This gentleman of unsound mind now may recover, and if he does not, a committee may be appointed, and in either case an action of ejectment might be brought to recover the property; and that being so, I do not see how I can, looking at the language of the 28th section of the Act, make the order asked for. This gentleman is a person whose concurrence in the application ought to have been obtained; but, in fact, it was not obtained, because he was not in a fit state of mind to give his concurrence. All these applications and consents are matters of statutory jurisdiction. The Court has no general jurisdiction to give consent. The power is expressly confined by the statute to special cases, and within those cases this one does not come. I am of opinion that this Court has no power to appoint a guardian in such a case. I may observe, that the application in *In re Venner's Settled Estates* was a mere *ex parte* one; but in this case the purchaser has taken an objection to the title, and I am of opinion that he was warranted in so doing, and therefore the summons must be dismissed, and with costs.

Solicitors: Messrs. *Frankish & Buchanan,* agents for Messrs. *Gold Edwards & Weston, Denbigh;* Messrs. *Gregory, Rowcliffes, & Rawle,* agents for Messrs. *Frodsham & Nicholson, Liverpool.*

(1) Law Rep. 6 Eq. 249.

McKECHNIE *v.* VAUGHAN.

[1871 M. 217.]

L. J. J. for V.-C. W. 1873 Feb. 26.

Will—Blanks—Number of Legatees—Incorrect Gift by a Testator.

Bequest "unto each of my four nieces , the daughters of my deceased brother *Joseph*, the sum of £500." There were five daughters of *Joseph*, who all survived the testator:—

Held, that the blank left in the will was not sufficient to distinguish this case so as to take it out of the settled rule, and that each of the five nieces was entitled to a legacy of £500.

JOHN VAUGHAN, by his will, dated the 4th of November, 1866, made the following disposition:—"I bequeath unto each of my four nieces , the daughters of my deceased brother *Joseph Vaughan*, the sum of £500, and I declare that the said sums shall be respectively for their sole and separate use, independently of their respective husbands."

The testator gave the residue of his real and personal estate to the Defendant *Vaughan*, whom he appointed executor. He died on the 16th of September, 1868, being seised of considerable real and personal estate. At the date of his will and of his death there were five nieces, the daughters of his deceased brother *Joseph Vaughan* mentioned in the will, each of whom claimed to be entitled to a legacy of £500. The Defendant *Vaughan* alleged that the gift was void for uncertainty. This bill was accordingly filed by two of the nieces of the testator, praying that it might be declared that the Plaintiffs and the other three nieces, daughters of the testator's deceased brother *Joseph Vaughan*, were entitled each to a legacy of £500 to her separate use.

Mr. *Dickinson*, Q.C., and Mr. *E. Cutler*, for the Plaintiffs:—

The case is governed by authority: *Garvey* v. *Hibbert* (1) and the cases collected in *Jarman* on Wills (2).

Mr. *Morgan*, Q.C., and Mr. *Proctor*, for the residuary legatee:—

This is distinguished from the ordinary cases by the blanks con-

(1) 19 Ves. 124.

(2) 3rd Ed. vol. ii. p. 179.

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tained in the will. It is quite settled that the blanks must be regarded like every other part of the will: *Mason* v. *Bateson* (1); *Taylor* v. *Richardson* (2). Looking, then, at these blanks, it is clear that the testator intended to select certain members of the class, that is, four out of the five, but not having done so, the only conclusion the Court can come to is, that the whole gift is void for uncertainty.

Mr. *Mitchell*, for the trustee.

Mr. *Jackson*, Q.C., and Mr. *Yate Lee*, for other parties.

Sir W. M. James, L.J.:—

The case is governed by authority, and putting aside for the moment the blanks in the will, the Court would be bound to hold that each of the five nieces is entitled to a legacy of £500.

Then do the blanks make any difference? It is said that the inference to be drawn from the occurrence of these blanks is, that the testator intended to select as objects of his bounty four out of the five nieces, and that not having done so the gift is void for uncertainty. It certainly is possible that such was the testator's intention. But may it not be that he was ignorant of the state of the family? This seems to me a much more probable hypothesis than that he intended to select four out of five of his nieces. What is there in the circumstances to make such an explanation likely? In my opinion the existence of these blanks in this will affords no substantial ground for taking this case out of the ordinary rule. There must, therefore, be a declaration that each of the five nieces is entitled to a legacy of £500.

Solicitors for the Plaintiffs: Messrs. *J. & R. Gole.*

Solicitors for the other Parties: Messrs. *Sharp & Ullithorne;* Messrs. *Simpson & Cullingford.*

(1) 26 Beav. 404. (2) 2 Drew. 16.

Ex parte LOVERING. *In re* THORPE.

C. J. B. 1873 Feb. 17.

Bankruptcy—Practice—Amount of Deposit on Appeal—Application to increase —Appellant resident abroad—Bankruptcy Rules, 1870, *r.* 145.

After an appeal has been entered with the Registrar, and the ordinary deposit of £20 has been made by the Appellant, it is too late for the Respondent to apply to have the amount of the deposit increased.

On the 26th of November, 1872, *Thomas Thorpe*, a trader, filed a petition for liquidation by arrangement. On the 11th of December the first meeting of the creditors was held, and it was resolved to accept a composition of 6*s.* 8*d.* in the pound, and Mr. *J. F. Lovering* was appointed trustee. On the 20th of December the second meeting of the creditors was held, when these resolutions were confirmed, and they were afterwards duly registered. On the 20th of November an action in the Queen's Bench had been commenced against *Thorpe* by a creditor named *Hartel*, who resided in *Saxony*, to recover a debt of £101 12*s.* 4*d.* due on a bill of exchange. On the 20th of December judgment was signed in this action, and on the 21st of December the sheriff seized goods of *Thorpe* under a writ of *fi. fa.* issued upon the judgment. On the 13th of January, 1873, upon the application of the debtor and the trustee, an order was made by the Chief Judge restraining *Hartel* from taking any further proceedings in the action, or upon the judgment recovered or execution issued therein, until further order. And it was ordered that the sheriff should forthwith withdraw from possession of the property and effects seized by him under the writ of *fi. fa.*, and that *Hartel* should pay to the applicants their costs of the motion. From this order *Hartel*, on the 1st of February, entered an appeal, and on so doing, deposited with the Registrar the sum of £20. Notice of the appeal motion was served on the debtor and the trustee. On the 4th of February they gave notice of an application to the Court on the 11th of February that *Hartel* should deposit with the Registrar an additional sum of £20. This application was made before Mr. Registrar *Roche*, sitting as Chief Judge, and he reserved the question to be heard by the Chief Judge himself.

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The application was now renewed.

Mr. *Brough*, for the debtor and the trustee:—

No application was made by the Appellant under Rule 145 of the Bankruptcy Rules, 1870 (1), to fix the amount of the deposit, and therefore the Respondents are entitled now to ask to have the amount increased. It ought in this case to be increased to £40, as the Appellant is resident abroad, just as in the Court of Chancery a Plaintiff out of the jurisdiction can be compelled to give security for costs. The Respondents have already incurred costs amounting to £50. We could not have made this application before, as, till the appeal had been entered, we did not know that any appeal would be brought.

Mr. *R. Vaughan Williams*, for the Appellant, was not called upon.

SIR JAMES BACON, C.J.:—

I do not think that I can accede to this application. If the present applicants had any intention of requiring that a larger sum than the ordinary £20 should be deposited in the event of an appeal from my decision being brought, they ought to have asked for it when that decision was given. They did not do this. The Appellant is now quite within the terms of Rule 145. At or before the time of entering his appeal he has deposited the only sum which, in the absence of any direction by the Court, he could be required to deposit. He has complied, I think, with the conditions imposed by the rule, and it is now too late to ask to have the amount of the deposit increased. It may very likely be a case in which that amount might properly have been increased, but the application was not made at the time when it ought to have been made. If it had been made then the Appellant would

(1) Rule 145 is as follows:—"At or before the time of entering an appeal, the party intending to appeal shall deposit with the registrar of appeals such sum, not being less than £10 and not exceeding £40, as the Court appealed from shall direct, to satisfy, so far as the same may extend, any costs that the Appellant may be ordered to pay; and, in the absence of any such direction, the sum deposited shall be £20."

not have been within the terms of the rule as he is now. The application must be refused.

Mr. *R. Vaughan Williams* asked for the costs of this application.

The CHIEF JUDGE:—The costs will stand over till the result of the appeal is known.

Solicitor for the Trustee: Mr. *W. A. Plunkett.*
Solicitor for the Creditor: Mr. *A. G. Ditton.*

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Feb. 22, 25.

In re DULWICH COLLEGE.

Practice—Charity—Costs—Charges and Expenses of Attorney-General.

When the Attorney-General, upon making an application to the Court of Chancery in the matter of a charity, desires an order for taxation and payment of his costs, charges, and expenses, relating to the charity, not being costs in the matter, the summons should contain a statement of the matters in respect of which payment of such costs is desired.

By an Act of Parliament (20 & 21 Vict. c. 84) a scheme of the Charity Commissioners for the management of *Dulwich College* was confirmed; and by such scheme it was provided that certain of the Governors should be appointed by the Court of Chancery upon application to be made by the Attorney-General either by petition or summons before one of the Judges of the Court sitting at Chambers.

On the 6th of June, 1872, a summons was taken out by the Attorney-General, intituled, In the matter of the Act of Parliament, and In the matter of the College, asking that the persons therein named might be appointed Governors of the College, and that the costs of the Attorney-General and the Governors of the application and consequent thereon, including in the costs of the Attorney-General any charges and expenses properly incurred by him in relation to the college "not being costs in these matters," might be taxed and paid by the Governors of the College out of the income thereof. The summons was duly served on the Governors, and an order made in accordance therewith on the 19th of June, 1872.

Under this order the solicitors of the Attorney-General carried in for taxation a bill of costs to the amount of upwards of £200. These costs appeared to have been incurred with reference to certain memorials relating to the management of the college which had been laid before the Attorney-General by the inhabitants of *Dulwich* and the neighbourhood; but which had not led to the institution of any legal proceedings by the Attorney-General. The Governors of the College objected to the allowance of these costs; but the Taxing Master was of opinion that if they had been sanctioned by the Attorney-General he could not inquire

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further, and was bound to allow them. Thereupon the Governors took out a summons asking that the order of the 19th of June, 1872, might be amended, or varied so far as regards the direction to tax the costs of the Attorney-General, by directing that the charges and expenses (if any) properly incurred by him might be limited to the appointment of Governors under the said order, and that if necessary the original summons upon which the order was made might be reheard.

This summons now came on to be heard.

Mr. *Southgate*, Q.C., and Mr. *W. F. Robinson*, for the Governors:—

The order of the 19th of June, 1872, is irregular. The case is simply this: Some one applies to the Attorney-General about the management of the college; the Attorney-General looks into the matter, but takes no proceedings. Then some time afterwards it is necessary to appoint new Governors, and thereupon the Attorney-General, without ever mentioning the matter, obtains an order for taxation and payment of his charges and expenses, under which it is impossible for the Governors to raise any question as to the propriety of those charges being allowed.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Vaughan Hawkins*, for the Attorney-General:—

The order was made in accordance with the terms of a summons duly served on the Governors, and not opposed by them. It is also in accordance with the regular practice of the Court. Whenever the Attorney-General makes an application of any kind in reference to a charity, he at the same time asks for his charges and expenses properly incurred; he never states what those charges are, but his word is taken that there are such. If it were otherwise, great expense would be occasioned to all charities by the filing of affidavits to shew what the charges were. The question as to the propriety of the items can be gone into before the Taxing Master; and this application is unnecessary, and ought to be refused.

Mr. *Southgate*, in reply, referred to the form of order under the *Charitable Trusts Act*, given in *Seton* on Decrees (1).

(1) Page 786.

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LORD ROMILLY, M.R.:—

This adjourned summons comes before me under the following circumstances:—On the 19th of June, 1872, an application was made by the Attorney-General for the appointment of new Governors of *Dulwich College*, and an order was then made for the payment of the costs, including the Attorney-General's costs, and any charges and expenses properly incurred by him in relation to the said college, not being costs in the matters. It is now alleged by the Governors that that order was too extensive, and that the costs of the Attorney-General ought to be limited to his costs in the matters only, and that, as in the case of ordinary trustees, the opinion of the Court should be taken as to the propriety of allowing such costs. It is objected, on the other hand, that the expense of filing so many affidavits would be a great infliction with respect to matters in Chambers. But there is no occasion for affidavits unless the matter is contested; if there is a contest, it should be submitted to the Court for its decision, and not for the decision of the Taxing Master. I shall therefore in future require the Attorney-General when he wants costs, not being costs in the matter, to make a statement to the Court of what it is in respect of which he asks for costs; and this being submitted to the other side, may or may not be contested. If it is, the Court must decide; if not, the order will be taken *sub silentio*. I do not mean that the bills of costs shall be submitted to the Court, but that matters not being before the Court in respect of which costs are required should be mentioned, in which case, when the application is approved, the costs will be submitted to the Taxing Master. The province of the Taxing Master is to determine whether the costs incurred are properly charged in particular matters which are specified; but it is not his province to determine whether the trustees or the Attorney-General properly embarked in certain proceedings; that is the province of the Court; and when the Court has determined that they did so properly embark, then the Taxing Master is to determine whether the costs charged for that purpose are proper. I am told that the order made is in accordance with the regular practice for a great length of time, and I have no doubt that that is so, though it is new to me. I think that it ought to be so no longer, and that

there is only one proper check to prevent the improper incurring of costs; not that this is a case where any imputation can be made against the Attorney-General, because he probably, certainly possibly, knew nothing at all about the matter. His solicitors are paid for work done and not by regular fixed salary; the consequence of which is that, without imputing the slightest disposition to them to take advantage of that circumstance, it is important that the solicitors to the Attorney-General should be subject to supervision. There is no supervision unless it is that of the Court. Here the work is done for *Dulwich College,* the Governors of which should have an opportunity of considering whether this is a proper case in which the charity should pay costs, and if necessary, of bringing the question before the Court. Nay, more, I think that for the solicitors themselves it must be more agreeable and satisfactory that the matter should be brought before the Court. I do not doubt the propriety of what they have done, but even with the best possible intentions mistakes may arise. This the Taxing Master cannot or ought not to determine. To allow him to do so would be a delegation of what are the first duties and functions of the Court to the Taxing Master, which, in my opinion, ought not to take place. Therefore I shall alter the order by striking out the words "to the said college, not being costs," and then the order will read thus: "including in the costs of the Attorney-General any charges and expenses properly incurred by him in relation to these matters." This is not to prevent the Attorney-General from applying for a summons to this Court to have the costs which he proposed to bring before the Taxing Master taxed and paid. This will either require a new summons and service on the Governors; or, as the order has been made, it will require the summons to be amended in order to state what the circumstances are. If the right to these costs is not contested, the matter need merely be mentioned to the Court so that it may know that the charity approves of it. In future, part of the summons on which in such cases the order is made will be a statement of the matters in respect of which the payment of costs is desired. Thus no extra expense will be occasioned to other charities, and I believe this will be a more wholesome rule and a more proper check upon the undue application for costs than a mere statement on applying for costs of matters the nature of

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which is to be afterwards gleaned from the bill itself when submitted to the Taxing Master. The costs on both sides in this case will be paid out of the charity estate.

Solicitors: Messrs. *Fearon, Clabon, & Fearon ;* Messrs. *Druce, Sons, & Jackson.*

M. R. 1873 *March* 8.

COCKAYNE *v.* HARRISON.

[1869 C. 118.]

COCKAYNE *v.* HARRISON.

[1869 C. 150.]

Solicitor and Client—Town Agent—Lien.

At the request of the client of a country solicitor, *R.* paid to the solicitor a sum of £350 in part discharge of costs due to the solicitor in respect of administration suits to which the client was Defendant, and the repayment was secured by a mortgage of the solicitor's lien. Afterwards the costs were ordered to be taxed, and paid out of a fund in Court to the town agents of the solicitor:—

Held, upon the Petition of the client, that the costs so ordered to be paid to the agent must be paid to *R.* in satisfaction of his claim under the mortgage.

Peatfield v. *Barlow* (1) followed.

THESE suits were instituted for the administration of the estate of *James Cockayne*, late of *West Bridgford*, in the county of *Nottingham.*

Messrs. *Cockayne & Talbot*, and (after the dissolution of the partnership between them) Mr. *C. H. Talbot*, of *Nottingham*, were the solicitors employed by the Defendants *John Harrison* and *William Thumbs*, the executors and trustees of *James Cockayne*, in the suits. Messrs. *Wilkins, Blyth, & Marsland* were the *London* agents of Messrs. *Cockayne & Talbot* and of Mr. *C. H. Talbot*, but had not been recognised by these Defendants as their solicitors.

In August, 1871, the Defendants *Harrison* and *Thumbs* were applied to by Messrs. *Cockayne & Talbot* to make a payment in respect of the costs of the suits, and an arrangement was made whereby Messrs. *Rothera & Carter*, solicitors in *Nottingham*, at the

(1) Law Rep. 8 Eq. 61.

request and by the direction of the Defendants, paid to Messrs. *Cockayne & Talbot* a sum of £350; and, as security for the repayment thereof to Messrs. *Rothera & Carter*, an indenture, dated the 11th of August, 1871, between Messrs. *Cockayne & Talbot* of the first part, *Harrison* and *Thumbs* of the second part, and Messrs. *Rothera & Carter* of the third part, was executed by all the parties thereto. This indenture recited to the effect that *Harrison* and *Thumbs* were indebted to Messrs. *Cockayne & Talbot* in sums exceeding £350 for costs, charges, and expenses incurred by Messrs. *Cockayne & Talbot* as their solicitors as executors of the will of the testator, and for the costs of the suits; that *Harrison* and *Thumbs* had deposited with Messrs. *Cockayne & Talbot* certain documents, on which Messrs. *Cockayne & Talbot* had, as against *Harrison* and *Thumbs*, a lien for the recovery of the said costs, charges, and expenses; and that Messrs. *Rothera & Carter* had agreed, at the request of the other parties to the indenture, to advance the sum of £350 to *Harrison* and *Thumbs*, to enable them to pay the same to Messrs. *Cockayne & Talbot* in part discharge of the costs, upon having the repayment thereof, with interest, secured in manner therein mentioned; and it witnessed that (in consideration of the sum of £350 to Messrs. *Cockayne & Talbot* paid by *Rothera & Carter* at the request and by the direction of *Harrison* and *Thumbs*) Messrs. *Cockayne & Talbot* and *Harrison* and *Thumbs* covenanted with Messrs. *Rothera & Carter* to repay the £350, with interest, within six calendar months from the date of the indenture, or within three calendar months after the completion of the taxation of the costs, under an order to be made for the purpose in the suits; that Messrs. *Cockayne & Talbot*, at such request and by such direction as aforesaid, had deposited with Messrs. *Rothera & Carter* the documents specified in the schedule thereto (being a portion of the documents subject to the aforesaid lien), to hold the same for all the interest of Messrs. *Cockayne & Talbot* and *Harrison* and *Thumbs* therein, by way of security for the due repayment to Messrs. *Rothera & Carter* of the £350 and interest, with full power for them to deal with and use the deposited documents for the same purposes and in the same manner as Messrs. *Cockayne & Talbot* and *Harrison* and *Thumbs* might have done if they had not been so deposited. The indenture next contained a covenant by Messrs.

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Cockayne & Talbot that in case the sum of £350 should remain due on the security for six calendar months from the date thereof, or for more than three calendar months after the completion of such taxation as aforesaid, they would, upon the request of Messrs. *Rothera & Carter*, repay the same sum with interest; and further, that if they or either of them, their or either of their executors, administrators, or assigns should, at any time thereafter during the continuance of the security thereby created, obtain from the Court of Chancery an order charging the estate of the testator, or any part thereof, with the payment of the costs, or any part thereof, then they or he would hold and be possessed of such charge upon trust, in the first place, to secure the payment to Messrs. *Rothera & Carter* of all sums for the time being due on the security, and subject thereto for such purposes as the same would have been applicable to if the deed had not been executed. And it was provided that, notwithstanding such deposit as aforesaid, the said lien of Messrs. *Cockayne & Talbot* should not be deemed in any manner prejudiced or affected to any greater extent than so far as might be necessary to give effect to the security, and that the possession of Messrs. *Rothera & Carter* should be deemed to be possession by Messrs. *Cockayne & Talbot*, so as to preserve the lien wholly unaffected otherwise than by charging the same with £350 and interest; and Messrs. *Rothera & Carter* agreed to deliver up the documents so soon as the principal and interest charged thereon should be satisfied.

By an order made, upon further consideration, on the 11th of March, 1872, it was, amongst other things, ordered that the Defendants *John Harrison* and *William Thumbs* should retain a balance in their hands (amounting to £73 4*s.* 11*d.*) on account of their costs; that their costs should be taxed as between solicitor and client; that so much of a certain fund in Court (consisting of £336 14*s.* 1*d.* Bank Annuities) as would raise such costs (after giving credit for the said £73 4*s.* 11*d.*) should be sold, and the proceeds of sale should be paid to Messrs. *Wilkins, Blyth, & Marsland*, their solicitors.

Messrs. *Harrison* and *Thumbs* now presented a petition in the suits, stating the foregoing facts, and also that the taxation of costs, directed by the order of the 11th of March, 1872, had not been

completed; that the sum of £73 4*s.* 11*d.*, referred to in that order, formed part of certain moneys received by Messrs. *Cockayne & Talbot* as their solicitors, on account of the personal estate of the testator, and had been by them retained and applied in part satisfaction of their bill of costs; and that the documents deposited with Messrs. *Rothera & Carter* formed part of the documents of title of certain real estate of the testator, which had been sold under an order of Court; and that it was doubtful whether the fund in Court would be sufficient for payment of the costs directed to be taxed; and it prayed that the Court might express its opinion that, by reason of the retainer of the £73 4*s.* 11*d.* and the payment of the £350 to Messrs. *Cockayne & Talbot* in manner aforesaid, the costs payable to them by the Petitioners, and which were, by the order of the 11th of March, 1872, directed to be taxed and paid to Messrs. *Wilkins, Blyth, & Marsland,* were to the extent of £73 4*s.* 11*d.* and £350 paid; that notwithstanding the order of the 11th of March, 1872, the costs of the Petitioners might, to an extent not exceeding the total amount of the said sums of £73 4*s.* 11*d.* and £350, be paid to Messrs. *Rothera & Carter* in satisfaction of their claims under the said indenture; and that, upon such payment being ordered, Messrs. *Rothera & Carter* might deposit with the Clerk of Records and Writs the documents deposited with them as aforesaid.

The Petition now came on to be heard.

Sir *R. Baggallay,* Q.C., and Mr. *Horton Smith,* for the Petitioners, relied on *Peatfield* v. *Barlow* (1); and they offered to give an undertaking to pay to Messrs. *Rothera & Carter* any sum which might be due to them in respect of interest on their mortgage debt which the sums of £73 4*s.* 11*d.* and £350 mentioned in the Petition might be insufficient to satisfy.

Mr. *Fry,* Q.C., and Mr. *J. G. Wood,* for Messrs. *Rothera & Carter.*

Mr. *Southgate,* Q.C., and Mr. *J. W. Chitty,* for Messrs. *Wilkins, Blyth, & Marsland:*—

The decision in *Peatfield* v. *Barlow* was founded on the circumstance that the client had paid the costs to the country solicitor, so

(1) Law Rep. 8 Eq. 61.

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that his lien was gone, and the town agent could stand in no better position. Here the deed of the 11th of August, 1871, is a mortgage of the lien, and is carefully framed to preserve it. No payment was made by the Petitioners; they only joined in the deed as sureties.

LORD ROMILLY, M.R.:—

I think this case is governed by *Peatfield* v. *Barlow* (1). The payment was made to the country solicitors by the desire of the Petitioners for the purposes of the suits, and that amounted to a part payment of the costs. There must be an order according to the prayer of the Petition, the Petitioners giving the undertaking offered at the Bar.

Solicitors: Messrs. *Austen, De Gex, & Harding;* Messrs. *Wilkins, Blyth, & Marsland.*

M. R. 1873 *March* 12.

COMMISSIONERS OF SEWERS OF THE CITY OF LONDON *v.* GLASSE.

[1871 L. 127.]

Exceptions to Answer—Interrogatories by Defendant—Discovery of Plaintiff's Evidence.

7 Ch D. 441. 447, 451 20 Ch D. 523,

A Defendant who files interrogatories for the examination of a Plaintiff is entitled to an answer with respect to all matters which tend to destroy the Plaintiff's case, but not with respect to matters which tend to support the Plaintiff's case.

Where, therefore, a bill was filed to establish a right of common, and a Defendant filed interrogatories requiring the Plaintiff to set forth any instance in which the right claimed by the bill had been enjoyed:—

Held, that the Plaintiff was not bound to answer.

Semble, that the Plaintiff would have been bound to answer interrogatories with respect to instances in which the right had been claimed and successfully resisted.

THIS was a suit on behalf of the Plaintiffs and all other the owners and occupiers of land or tenements lying within the *Forest of Essex* other than the waste lands of the said forest, except such of them as were Defendants, or were alleged to be

(1) Law Rep. 8 Eq. 61.

sufficiently represented by the Defendants, or some of them; and the object of the suit was to establish in favour of the parties represented by the Plaintiffs as against the Defendants (who were the lords of divers manors within the forest, and certain persons who had inclosed pieces of waste land within the forest) certain rights of common over the whole of the waste land within the forest: see the case reported on demurrer (1).

One of the Defendants was *James Mills*, the lord of the manor of *Chigwell* and *West Hatch*, within the forest. By his answer he alleged that the rights of common over the waste lands within his manor had been enjoyed by the tenants thereof only, and denied that the occupiers or owners of lands within the forest but not within the manor had ever enjoyed any right of common over the waste lands of the manor. He afterwards filed a concise statement and interrogatories for the examination of the Plaintiffs, and thereby interrogated as follows:—"Is it not the fact that no owners or occupiers of land within the said forest but not within the said manor have ever enjoyed any right of common of pasture over the waste lands of the said manor? If the Plaintiffs allege that they have, let them set forth any instance in which such rights have been enjoyed, and by whom, and when, and in respect of what land, and where such land was situated, and in respect of what cattle or other animals." The Plaintiffs answered this interrogatory in the following terms:—"It is not the fact that no owners or occupiers of land within the said forest but not within the said manor have ever enjoyed any right of common of pasture over the waste lands of the said manor, but, on the contrary, we allege that such owners and occupiers have enjoyed such right; and as to that part of the said Defendant's 8th interrogatory, in which we are required to set forth any instance in which such rights have been enjoyed, and by whom, and when, and in respect of what land, and where such land was situated, and in respect of what cattle or other animals, we say that the said particulars form part of the evidence which we shall adduce at the hearing of this cause in support of our said claim; and we submit that at this stage of the cause we are not bound to set forth, and we accordingly refuse to set forth, the same."

(1) Law Rep. 7 Ch. 456.

M. R.

1873

COMMISSIONERS OF SEWERS OF THE CITY OF LONDON v. GLASSE.

The Defendant took exceptions to this answer.

Mr. *Southgate*, Q.C., and Mr. *W. F. Robinson*, for the Defendant *Mills*:—

It may be that if these were exceptions to a Defendant's answer to Plaintiff's interrogatories, they would fail; but there is a difference where the answer is to a Defendant's interrogatories. A Defendant may ask, and a Plaintiff is bound to answer, any questions which tend to destroy the Plaintiff's claim: *Hoffmann* v. *Postill* (1); *Lowndes* v. *Davies* (2). It is obviously most desirable that the cases intended to be relied on by the Plaintiffs should be stated, otherwise, if replication is filed, the Defendant may be taken by surprise, and have no opportunity of adducing evidence in opposition.

Mr. *Joshua Williams*, Q.C., Mr. *Fry*, Q.C., Mr. *Speed*, and Mr. *W. R. Fisher*, for the Plaintiffs, were not called upon.

LORD ROMILLY, M.R., said that, although some of the exceptions which were allowed in *Hoffmann* v. *Postill* appeared to relate rather to matters of argument than matters of fact, he admitted the accuracy of the proposition there laid down, that a Plaintiff was bound to answer questions tending to destroy his case; but at the same time a Plaintiff was not bound to answer questions as to matters which tended to support his case. The party interrogating (whether Plaintiff or Defendant) was always entitled to discovery of everything which made out his own case, or which shewed that he was in the right, but not to discovery of matters which supported his opponent's case, or shewed that his opponent was in the right. If, for example, this Defendant had alleged that there were cases in which the right set up by the Plaintiffs had been claimed and successfully resisted, and had interrogated the Plaintiffs as to such cases, he would have been entitled to an answer; but the interrogatories simply required the Plaintiffs to disclose the evidence in support of their case. If the Plaintiffs were compelled to answer these interrogatories, the result would be that at the hearing the Defendants would object

(1) Law Rep. 4 Ch. 673. (2) 6 Sim. 468.

to any cases being brought forward which were not mentioned in the answer, on the ground that they had no opportunity of meeting them. That was not the rule of the Court, and the exceptions must be overruled with costs.

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1873
COMMISSIONERS OF SEWERS OF THE CITY OF LONDON. *v.* GLASSE.

Solicitors: Messrs. *Druce, Sons, & Jackson;* Messrs. *Horne & Hunter.*

SHERRATT *v.* MOUNTFORD.

M. R.
1873
March 13.

[1868 S. 129.]

Will—Words, "My Nephews and Nieces"—Nephews and Nieces of Testator's Wife.

Residuary gift in trust for "my nephews and nieces living and the issue of any my nephews and nieces dead before me." Testator left brothers and sisters, but never had any nephews or nieces of his own:—

Held, that his wife's nephews and nieces were entitled to the gift.

6 Hare 275

JAMES BILLINGS, by his will, after a devise and bequest to his cousins *John* and *Hugh Mountford*, proceeded as follows: "All the rest of my property, real and personal, I give to my said cousins in trust for them and my nephews and nieces living, and the issue of any my nephews and nieces dead before me, such issue taking only the parent's share."

The testator, though he had some brothers and sisters, never had any nephews and nieces of his own, but there were several nephews and nieces of his wife. The testator's wife died before the date of his will. Some of her nephews and nieces survived the testator, and some had died leaving issue in the testator's lifetime.

The suit was instituted by a nephew of the testator's wife, claiming, on behalf of himself and her other nephews and nieces and the issue of such of them as were dead, an interest in the said residuary gift.

Mr. *Roxburgh*, Q.C., and Mr. *Batten*, for the Plaintiff:—

The words in the residuary gift, in favour of "my nephews and nieces living, and the issue of any my nephews and nieces dead before me," must, in the absence of any relatives of the testator

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answering that description on his own side, be taken to mean his wife's nephews and nieces, whom, in a popular sense, he would call his own.

In the case of *Grant* v. *Grant* (1), where a testator devised property to "my nephew *Joseph Grant*," and appointed him his executor, and it appeared that the testator's brother had a son named *Joseph Grant*, and that the brother of the testator's wife had also a son of the same name, it was held by Lord *Penzance* in the Probate Court, and subsequently by the Court of Common Pleas, and, on appeal, by the Exchequer Chamber, that the description "my nephew" was applicable to both *Joseph Grants*, and that parol evidence was admissible to shew which of them was meant by the testator.

Here there are no other persons who can answer the description except the wife's nephews and nieces, who are, therefore, entitled to take.

Sir *R. Baggallay*, Q.C., and Mr. *Vaughan Hawkins*, for the executors:—

The Plaintiff and those he represents are not entitled to take under the description of "my nephews and nieces." Strangers in blood to a testator, though related by affinity, cannot be included in words used to designate blood-relations unless they are expressly designated in the will: *Smith* v. *Lidiard* (2).

It is true that there are no other persons to answer the description given by the testator, but that is not enough to induce the Court to alter the proper meaning of the words used in the will: *In re Standley's Estate* (3). There are, undoubtedly, cases where the Court has extended the ordinary meaning of words, as in *In re Blower's Trusts* (4), but then there must be some indication on the face of the will, and not derived merely from extrinsic evidence.

In *Hogg* v. *Cook* (5), where there was a bequest to a testator's grandchildren, nephews and nieces, and the testator had no brothers and sisters, and therefore no nephews and nieces, your Lordship held that the nephews and nieces of his wife were entitled; but that case cannot govern the present, because here the testator had

(1) Law Rep. 2 P. & D. 8; Ibid. 5 C. P. 380, 727.
(2) 3 K. & J. 252.
(3) Law Rep. 5 Eq. 303.
(4) Ibid. 11 Eq. 97.
(5) 32 Beav. 641.

brothers and sisters, and therefore there was a possibility of nephews and nieces of his own being born after the date of his will and before his death.

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Mr. *Bevir*, for the heir-at-law.

Mr. *Southgate*, Q.C., and Mr. *Humphreys*, for the next of kin.

LORD ROMILLY, M.R.:—

I have before decided, and still hold, that where there is a gift by will to "my nephews and nieces," and a testator has none of his own, but there are nephews and nieces of his wife, such persons being commonly spoken of as a man's own nephews and nieces, they are entitled to take. There will be a declaration accordingly.

Solicitors for the Plaintiff: Messrs. *Wedlake & Letts*, agents for Messrs. *Keary & Marshall, Stoke-upon-Trent.*

Solicitors for the Defendants: Messrs. *Tibbitts & Co.*; Mr. *J. Burton.*

SLARK *v.* DAKYNS.

M. R. 1873 March 14.

[1872 S. 213.]

Will—Power to appoint to Children—Gift to Child of Life Interest with Power to appoint by Will.

A testator gave certain property upon trust for his granddaughter A. for life, and after her death for her children, or some of them, as she should by deed or will appoint. A., by her will, appointed one-fifth of the fund to each of five children (all of whom were living at the death of the original testator) for life, and after the death of each child, directed that the share in which the child had a life interest should be held in such manner as the child might by will appoint, with limitations over in default of appointment, in favour of the children of the said five children and of the survivors in different events:—

Held, a good exercise of the power of appointment given by the will of the testator.

Phipson v. *Turner* (1) followed.

WILLIAM BOUND, by his will, dated the 2nd of April, 1838, gave certain real and personal estate to trustees upon trust for

(1) 9 Sim. 227.

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his granddaughter, *Anna Maria Slark*, for life, and after her death upon trust for her children, or some of them, or some of their heirs, executors, or administrators, as she should by deed or will appoint; and in default of appointment, for all her children who being a son or sons should attain twenty-one, or being a daughter or daughters should attain that age or marry, their heirs, executors, and administrators, in equal shares as tenants in common. The testator died in 1846. *Anna Maria Slark* had six children, viz., *Eliza Jane Cope*, *Anna Maria Dakyns*, *Emily Ann Cope*, *Ellen Mary Bird*, *Louisa Laura Cobbett*, and *William Slark*, all of whom were living at the death of the testator.

By her will, dated the 8th of December, 1865, *Anna Maria Slark* directed that out of the funds, subject to the trusts of the will of *William Bound*, an annuity of £100 a year should be paid to *Anna Maria Dakyns*, and subject thereto that the said funds should be held upon trust as to one-fifth share thereof to pay the income of such share to *William Slark* for his life, and as to another one-fifth share to pay the income of such share to her daughter *Eliza Jane Cope* during her life for her separate use, without power of anticipation (so far as such restriction could be lawfully imposed); then followed similar appointments as to the remaining three-fifths in favour of *Emily Ann Cope*, *Ellen Mary Bird*, and *Louisa Laura Cobbett*. And the testatrix directed that, subject to the trusts thereinbefore declared for the benefit of *William Slark*, *Eliza Jane Cope*, *Emily Ann Cope*, *Ellen Mary Bird*, and *Louisa Laura Cobbett*, the one-fifth share, the income whereof was thereinbefore provided for each of them during his or her respective life, should, after his or her decease, go and be held upon and for such trusts and purposes as he or she respectively should by will appoint: provided always that if her said son, or any of them her said last-named daughters, should survive her, and should have any child who should be living at his or her respective death, or should previously have died having attained the age of twenty-one years, then the share thereby made subject to the appointment by will of her said son, or (as the case might be) of such daughter, or such part thereof as should not have been absolutely appointed under the aforesaid power in that behalf, should go and be in trust for her said son, or (as the case might

be) such daughter, and his or her heirs, executors, administrators, and assigns, for his, her, and their respective absolute use and benefit: provided also that if the said son, or any of them her four last-named daughters, should die in her lifetime, or, having survived her, should afterwards die without having had any child who should be living at his or her respective decease, or who should have died after having attained the age of twenty-one, then (in default of any direction or appointment to the contrary under the powers thereinbefore in that behalf contained) the share or shares thereinbefore originally appointed to him or her during his or her life, and made subject to his or her appointment as aforesaid, as well as the share or shares by the present proviso surviving or accruing, should be held in trust for the survivors or survivor or others or other of her said son and four last-named daughters; and if more than one, in equal shares, but so that the share or shares of each of them under the present proviso should go and be upon and for such and the same or the like trusts, intents, and purposes as were thereinbefore declared concerning his or her original share.

The testatrix died in 1871. *Eliza Jane Cope* died in 1870, intestate, and leaving her husband and a child surviving; all the other children survived the testatrix.

Upon the death of the testatrix the question arose whether the share given to *Eliza Jane Cope* for life and over was well appointed by the will of the testatrix; and this suit was instituted for the purpose of ascertaining the rights of the parties.

Mr. *Southgate*, Q.C. (Mr. *J. W. Chitty* with him), for the Plaintiff *William Slark*, submitted that the share of *Eliza Jane Cope* was well appointed, relying on *Phipson* v. *Turner* (1), cited in *Sugden* on Powers (2).

Mr. *A. T. Watson*, for *Anna Maria Dakyns* and the other surviving daughters of Mrs. *Slark*:—

I contend that the appointment made by Mrs. *Slark* is bad, so far as it confers on her children power to appoint by will. The power conferred on Mrs. *Slark* by the will of *William Bound* was

(1) 9 Sim. 227. (2) 8th Ed. p. 683.

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to appoint to children only; that was not properly exercised by giving to a child a life interest in a share, with power to appoint by will, though it would have been otherwise if the power had been to appoint by deed, for then a child might have appointed to himself, or, at all events, he would have had complete dominion over the share, which he had not in the present case. *Phipson* v. *Turner* (1) stands by itself. It was partly founded on the case of *Bray* v. *Bree* (2), but there life interests were given to the appointees, followed by powers to appoint by deed or will, and not by will only, as here. Again, the Vice-Chancellor said: "Suppose that Mrs. *Tomlinson* had appointed to her daughter, Mrs. *Phipson*, and then had directed that such part of the fund as should not be disposed of by will or otherwise should go to her two sons, it cannot be disputed that that would have been a good exercise of her power." I submit, however, that recent decisions have shewn that such a gift over would have been bad for repugnancy: *Holmes* v. *Godson* (3); *Barton* v. *Barton* (4). This power to appoint by will being bad, the gift over is bad also; and the share must go, under the will of *William Bound*, as in default of appointment.

Mr. *W. Pearson* (Mr. *Fry*, Q.C., with him), for the husband and child of *Eliza Jane Cope*, submitted that the share must go under the will of *William Bound* as in default of appointment, on the ground that the gifts after the life interests to the children were void for remoteness: *Wollaston* v. *King* (5).

LORD ROMILLY, M.R.:—

I must follow *Phipson* v. *Turner*. Even if it were wrongly decided, I could not overrule it at this distance of time. As to the question of remoteness, it does not arise, as all the children of Mrs. *Slark* were in existence at the time of the creation of the power. I am of opinion, therefore, that the power is well executed.

Solicitor for all Parties: Mr. *H. P. Bird.*

(1) 9 Sim. 227.
(2) 2 Cl. & F. 453.
(3) 8 D. M. & G. 152; 2 Jur. N.S. 389
(4) 3 K. & J. 512; 3 Jur. N.S. 808
(5) Law Rep. 8 Eq. 165.

HARRISS *v.* FAWCETT.

[1872 H. 53.]

M. R.
1873
March 15.

Principal and Surety—Guarantee determinable by Notice from Guarantor—Death of Guarantor—Notice of Death—Determination of Guarantee.

A guarantee to continue in force until six months after notice in writing under the hand of the guarantor of his intention to discontinue the same :—

Held, to be determined by notice of the death of the guarantor.

Bradbury v. *Morgan* (1) questioned.

THIS was a suit for the administration of the estate of *Joseph Fawcett*, under which the *Wakefield and Barnsley Union Bank* carried in a claim which was now brought before the Court for adjudication.

The claim arose on a written guarantee, dated the 21st of October, 1840, signed by *Joseph Fawcett* and addressed to the Bank and their trustees, whereby *Joseph Fawcett* undertook and promised to the trustees to make good and guarantee to the Bank the due and punctual payment of all such sums as might thereafter at any time or times be advanced or paid by or on account of the Bank, or as the Bank might at any time or times thereafter pay or become liable to pay for or on account of *James Fawcett* (a son of *Joseph Fawcett*) or his order; but so that the liability of *Joseph Fawcett* should not exceed at any one time the sum of £3000. The guarantee contained the following clause: "This guarantee or engagement shall be considered a continuing guarantee, and shall not be withdrawn, but shall continue in full force until six months after notice to the manager of the said Bank, in writing under my hand, of my intention to discontinue the same."

Joseph Fawcett died in September, 1867, having by his will appointed *James Fawcett* his sole executor. *James Fawcett* accepted the office. The Bank made considerable advances to *James Fawcett* on the security of the guarantee, and at the time of his father's death he was indebted to the Bank in upwards of £5415 8*s.* 3*d.* After the death *James Fawcett* continued to deal with the Bank,

(1) 1 H. & C. 249.

M. R. 1873 HARRISS v. FAWCETT.

whose officers had notice that he was his father's executor. *James Fawcett* died in March, 1870. He had in the interval between his father's death and his own paid the Bank sums far exceeding £5415 8*s.* 3*d.*, but he was at his death indebted to the Bank in the sum of £2345 7*s.* 4*d.*, for which the Bank now claimed to prove against *Joseph Fawcett's* estate under the guarantee.

No notice to discontinue the guarantee was ever given either by *Joseph* or *James Fawcett.*

Mr. *Fry*, Q.C., and Mr. *Freeling*, for the Bank:—

There appears to have been formerly a notion that a guarantee such as this was revoked by the death of the guarantor: *Smith's* Mercantile Law (1); but the contrary was decided after an elaborate argument in *Bradbury* v. *Morgan* (2). On the authority of that case this claim must be allowed.

[They also referred to *Offord* v. *Davies* (3).]

Mr. *Southgate*, Q.C., and Mr. *Bathurst*, for the Plaintiffs in the suit:—

Bradbury v. *Morgan* was decided on demurrer, and it was admitted by the pleadings that the Plaintiffs, to whom the guarantee was given, had no notice of the death of the guarantor when they made their advances. In the present case it is admitted that the debt sought to be proved was incurred after the Bank had notice of the death of the guarantor. Further, the Bank had notice that *James Fawcett*, with whom they dealt, was the sole executor of *Joseph Fawcett*, who gave the guarantee: the Bank must therefore be taken to have known that it was the duty of *James Fawcett* to determine the guarantee, and that his not doing so was a breach of trust; and under these circumstances the Bank cannot be allowed to avail themselves of any right to prove under the guarantee. *Watkins* v. *Cheek* (4) illustrates this doctrine of the Court.

Mr. *W. Pearson*, for the Defendants.

The MASTER OF THE ROLLS:—I am not at all disposed to go beyond the point decided in *Bradbury* v. *Morgan.*

(1) 4th Ed. p. 425.
(2) 1 H. & C. 219.
(3) 12 C. B. (N.S.) 748.
(4) 2 S. & S. 199.

Mr. *Fry*, in reply, urged that the judgments delivered in *Bradbury* v. *Morgan* (1) did not turn in any way on the absence of notice of the guarantor's death.

LORD ROMILLY, M.R.:—

I admit that there is very little distinction between this case and that of *Bradbury* v. *Morgan;* but there is this distinction between the two cases: here the guarantor is dead, and the Bank knew of his death; in the other case (which was decided upon demurrer) it was admitted by the pleadings that they did not know of his death. Whether that is material or not I do not now intend to inquire; and I fully admit that the Judges do not found their judgment upon that in the slightest degree; but I am unable to follow the reasoning upon which their decision is founded. I think it a very startling thing to say, as the Chief Baron in effect does say there, that the words "I give you notice" mean "you receive notice." It is a very startling proposition, because, if so, if a stranger gave notice in the lifetime of the guarantor, that would be a sufficient notice to determine it. But surely that can hardly be meant. This guarantee is very distinct; it is to continue "until six months after notice to the manager of the said bank, in writing under my hand, of my intention to discontinue the same." What does the guarantor mean? Would it be sufficient if somebody else gave a notice, and without it being under the hand of the guarantor? Can anybody contend, or would even the Chief Baron maintain, that that would be a sufficient notice? Then is the guarantee to go on for ever, in the case of the death of the guarantor? I am of opinion that as notice has not been given, as it could not be given after the death of *Joseph Fawcett*, and as the Bank knew it could not be given, thereupon the guarantee was over. I am not disposed to follow *Bradbury* v. *Morgan* even in a case exactly similar, and certainly I shall not extend that case. I shall therefore dismiss the claim with costs.

Solicitors: Messrs. *Torr, Janeway, & Co.;* Mr. *Stretton;* Messrs. *Sharp & Ullithorne.*

(1) I H. & C. 249

M. R.
1873
March 24.

BILLSON *v.* CROFTS.

[1872 B. 378.]

Gift over on Insolvency—Composition Deed—Recital of inability to pay Debts—Forfeiture.

By a will certain property was given upon trust for *A.* during his life, or until he should become bankrupt or insolvent, or make a general assignment for the benefit of his creditors, or otherwise deprive himself, or be deprived by law, of the beneficial enjoyment thereof, and after the happening of any such event, over:—

Held, that the gift over took effect upon *A.* executing a composition deed containing a recital that he was unable to pay his debts in full; and that *A.* could not afterwards dispute the accuracy of the recital.

SAMUEL BILLSON, by his will, dated the 30th of April, 1861, gave certain property to trustees upon trust to pay the income to the Plaintiff during his life, or until he should become bankrupt or insolvent, or make a general assignment for the benefit of his creditors, or otherwise deprive himself, or be deprived by law, of the beneficial enjoyment thereof, and after the happening of any such event to pay the same income to the Defendant *Mary Billson* for her life.

The testator died in 1862.

On the 19th of November, 1868, the Plaintiff executed a composition deed, reciting, amongst other things, that he had become indebted to his creditors in divers sums of money which he was unable to pay in full; and he thereby covenanted to pay his creditors a composition of 10*s.* in the pound, but made no assignment of any part of his property.

The object of the suit was to obtain a declaration that the Plaintiff had not forfeited his life interest under the will of *Samuel Billson* by executing this deed. It appeared that at the time the Plaintiff executed the deed he was entitled to a reversionary interest under the same will, but was not aware that he was so entitled; and it was alleged by the bill, and there was some evidence to shew, that the value of this reversion would have been more than sufficient for payment of all his debts in full.

Sir *R. Baggallay*, Q.C., and Mr. *Field*, for the Plaintiff, submitted that, as the Plaintiff had neither become bankrupt nor insolvent, nor executed any assignment for the benefit of his creditors, he had not forfeited his interest under the will.

Mr. *J. W. Carlile*, for the surviving trustee of the will.

Mr. *Southgate*, Q.C., and Mr. *Cozens-Hardy*, for *Mary Billson* :—

The Plaintiff has not, in point of fact, paid his debts in full, and that constitutes insolvency within the meaning of the testator, and the fact that he had property sufficient to enable him to do so makes no difference: *Parker* v. *Gossage* (1); *Biddlecombe* v. *Bond* (2); *De Tastet* v. *Le Tavernier* (3); *Re Muggeridge's Trusts* (4); *Freeman* v. *Bowen* (5); *Montefiore* v. *Enthoven* (6).

Sir *R. Baggallay*, in reply :—

The cases cited only shew that the recital in the deed is *primâ facie* evidence of insolvency; but the Plaintiff is not estopped from shewing that he was in fact solvent, and he has done so. If the recital had been fraudulent, it may be that the Court would have held the Plaintiff bound by it; but the Plaintiff was ignorant of his rights, and committed no fraud.

LORD ROMILLY, M.R. :—

I think that the cases shew that the Plaintiff is bound by the statement in the deed he has executed, and that he cannot now dispute his insolvency. I have little doubt that the Plaintiff was really insolvent at the time when he executed the deed, but the recital settles the question; and I must make a declaration that the Plaintiff's life interest has ceased.

Solicitors: Messrs. *Field, Roscoe, & Co.*; Messrs. *Sharpe, Parkers, & Co.*

(1) 2 C. M. & R. 617.
(2) 4 A. & E. 332.
(3) 1 Keen, 161.
(4) Joh. 625.
(5) 35 Beav. 17.
(6) Law Rep. 5 Eq. 35.

M. R.
1873
March 6.

POVAH *v.* WALKER.

[1870 P. 148.]

Practice—Deposit of Securities in Court—Form of Order—Court of Chancery (Funds) Act, 1872 (35 & 36 *Vict. c.* 44), *ss.* 3, 6, 10.

Form of order when securities of a miscellaneous character are brought into Court under the *Court of Chancery (Funds) Act*, 1872, ss. 3, 6, 10.

THIS was an application, by way of adjourned summons, on behalf of the Plaintiff in the cause, for certain securities to be brought into Court under sects. 3, 6, and 10 of the *Court of Chancery (Funds) Act*, 1872, by three Defendants, or the survivors or survivor of them.

There were three classes of securities:—

1. Bonds which passed by transfer deeds—the bonds being retained by the holder, and the transfer deeds being retained and registered by the company or board.
2. Railway Stock which passed by transfer deeds retained and registered by the company.
3. Bonds which passed by indorsement.

These three classes of securities are included respectively in the 1st, 2nd, and 3rd parts of the schedule to the order (*infra*).

Mr. *Southgate*, Q.C., and Mr. *F. T. White*, in support of the application.

LORD ROMILLY, M.R., made an order, as asked, that the securities in question might be brought into Court.

MINUTES OF ORDER (1):—That the Defendants, or the survivors or survivor of them, on or before the 30th of April, 1873, deposit in Court to the credit of the cause, *Povah* v. *Walker*, 1870 P. 148, such of the several securities mentioned in the affidavit of *J. L.*, as are specified in Part 1 of the schedule hereto, for the several sums therein mentioned, amounting together to £ , and execute and procure to be registered a transfer of such securities to the account of the Pay-

(1) Reg. Lib. 1873, B. 568.

master General; and do also, within the time aforesaid, transfer into Court to the like credit such of the said securities as are specified in Part 2 of the schedule hereto; and that any principal money to be received in respect of any of such securities be placed to the like credit, and be invested in Reduced Annuities; and that the dividends, as they accrue, on such securities so to be transferred, and on any Reduced Annuities that may be so purchased, be paid to the Receiver in this cause; and that the Defendants, or the survivors or survivor of them, do, on or before the 30th of April, 1873, deposit in a box to be indorsed "In Chancery—*Povah* v. *Walker*, 1870 P. 148 Securities,"—such of the securities as are specified in Part 3 of the schedule hereto, and deposit the said box in Court to the like credit, and deliver to the said Receiver the coupons for the interest on the two *Holborn* Improvement Bonds in the said Part 3 mentioned, and also any documents in their custody or power, that may be requisite to enable him to receive the dividends to accrue on the said last-mentioned securities.

THE SCHEDULE referred to in the foregoing Order:

PART 1.

Ten Bonds of the *St. George-in-the-East* Paving Board.
One Bond of the *Southampton Waterworks Commissioners.*
Two Bonds of the *Mersey Dock and Harbour Board.*
Three Bonds of the *St. Pancras Bedford Estate.*
Four Bonds of the *St. Pancras Skinner's Estate.*
Three Bonds of the *Lambeth Waterworks.*

PART 2.

£	*East India Peninsular Railway Company* Stock.		
£	*London, Chatham, & Dover Railway Company*		Arbitration Stock.
£	do.	do.	Preference Stock.
£	do.	do.	Ordinary Stock.

PART 3.

Two Bonds (issued under *Holborn Valley Improvement Act*, 1864,) without the coupons for the interest thereon.

Solicitor: Mr. *J. Letts.*

V.-C. B.
1873
Feb. 26.

NORRIS *v.* FRAZER.

[1869 N. 18.]

Will—Absolute Bequest—Secret Trust—Husband and Wife—Marital Right.

Testator gave the residue (which amounted in value to about £6500) of his personal estate upon trust to permit a married woman to receive the income during her life, with remainder after her death for the benefit of her children, and if no children, for the husband absolutely. In the event of the death of the wife in the lifetime of her aunt *N.*, testator directed that the then legally secured income of the aunt, if below £250 a year, should be made up to that amount.

From the death of the testator, in April, 1861, down to February, 1865, an annuity of £300 was regularly paid to *N.*, by arrangement, out of the husband's banking account; but the wife having eloped in September, 1864, the payment was, after the above date, discontinued.

In 1869, the bill was filed by *N.* against the husband and wife, alleging by amendment, after the answer of the wife (who supported the Plaintiff's case) had come in, that the husband and wife both promised the testator, at his request, on his death-bed, to make an allowance of £300 a year to the Plaintiff, and praying for a declaration that the income of the testator's residuary real and personal estate "was and is subject to a trust" for the payment of £300 a year to the Plaintiff during the wife's life, if the Plaintiff should so long live; and for payment of the arrears of the annuity by the husband.

The husband denied having made any such promise; but it having been found as a result of the evidence that a promise, as alleged, was made to the testator by the wife, and was assented to by the husband:—

Held, that the income of the testator's estate was subject to the alleged trust; and an account and payment ordered accordingly.

No costs allowed to the Plaintiff, who was merely a nominal suitor; the suit being, in substance, that of the wife.

McCormick v. *Grogan* (1) followed.

Cause.

Charles King, of *Brighton*, by his will, dated the 14th of July, 1832, bequeathed £10,000 to *John Witt*, *George Weeks Willis*, and *Frank Atkinson Argles*, upon trust to pay the income of the investment to his only child, *Georgiana Clara King*, for life, for her separate use, and on her death to divide and pay the same between and unto her children as therein mentioned. Having given a legacy of £8000 to *G. W. Willis*, and a legacy of £1000 to his daughter's aunt, *Nancy Ann Norris*, he bequeathed the residue of

(1) Law Rep. 4 H. L. 82.

his personal estate (in the events which happened) to *Georgiana Clara King* absolutely.

On the 12th of October, 1854, *Georgiana Clara King* married the Rev. *Arthur Bruce Frazer*.

Charles King died on the 27th of November, 1860, and his will was duly proved by the three above-named trustees, who were also appointed executors. The personal estate amounted to nearly £60,000.

On the 17th of January, 1861, *G. W. Willis*, who had lived with *Charles King* at his house at *Brighton*, and was supposed to be his natural son, made his will, whereby he gave the residue of his real and personal estate to trustees thereinafter named, upon trust to convert and get in the same, and invest the proceeds as therein mentioned, and permit Mrs. *Frazer* to receive the income during her life; and after her death, he directed that the funds should be in trust for and to be equally divided among all her children. In the event of the death of Mrs. *Frazer* during the lifetime of her husband, without leaving a child or children, testator gave the residue of his real and personal estate to Mr. *Frazer* absolutely, subject to an outlay of £800 as therein mentioned. Testator further directed that, in case Mrs. *Frazer* should die in the lifetime of her aunt, *Nancy Ann Norris*, and Miss *Norris* should be then entitled to and should be in the actual receipt of an annual income of less than £250 a year, legally and properly secured to her, a sum should be appropriated or realized from his real and personal estate, the annual income of which should be sufficient to make up, with the legally secured income which Miss *Norris* might then have, the sum of £250, and which annual income he desired should be paid by his trustees to Miss *Norris* half-yearly, for her life, and after her death the principal so realized should form part of the residue of his personal estate. The testator appointed *John Witt*, *Arthur Bruce Frazer*, and *William Henry Moberley*, his executors, and *John Witt*, *Arthur Bruce Frazer*, and *Georgiana Clara Frazer*, his wife, his trustees.

By a codicil, dated the 17th of January, 1861, to the above will, the testator devised to Mrs. *Frazer*, her heirs and assigns, for her and their own separate use, absolutely, a freehold house, called *Lottery Hall*, *Orchard Place*, *Southampton*.

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The testator *Willis* died on the 26th of April, 1861. His residuary personalty amounted to about £6500. This sum was at first advanced on mortgage to Mr. *Frazer*, and was afterwards invested in £3 per cent stock, yielding about £208 a year.

On the 31st of May, 1862, Mr. *Frazer* executed a voluntary settlement of a sum of £27,000 New 3 per Cents, which had formed part of the residuary estate of *Charles King*, and to which he (the settlor), having reduced the same into possession, had become entitled in right of his wife, upon trust, during the joint lives of himself and his wife, for Mrs. *Frazer* for her separate use, and after the death of such one of them as should first die, for the survivor for life, and after the death of the survivor, for the benefit of the children of the marriage, and if there should be no child, then, in case Mrs. *Frazer* should survive, upon trust for her absolutely; if not, for her next of kin.

Questions having been raised as to the ultimate destination of the above legacy of £10,000, that sum was paid into Court, and now consisted of a sum of £10,819 13*s.* 6*d.* stock; and by an order dated the 12th of December, 1862, the dividends were directed to be paid to Mrs. *Frazer* for life for her separate use.

On the 13th of September, 1864, Mrs. *Frazer* eloped from Mr. *Frazer*.

From the testator *Willis'* death down to February, 1865, a sum of £300 a year was regularly paid to Miss *Norris* out of Mr. *Frazer's* account at his bankers, Messrs. *Hall & Co.*, of *Brighton*, but after that date payment was discontinued.

On the 19th of May, 1865, Mrs. *Frazer's* then solicitors, Messrs. *Clarke, Son, & Rawlins*, wrote to Mr. *Somers Clarke*, of *Brighton*, Mr. *Frazer's* solicitor, saying they had heard from Mrs. *Frazer*, and that she said the fact of Mr. *Frazer* declining to contribute anything towards her aunt's £300 a year filled her with astonishment; and that if he still declined to assist her in this payment she had no alternative but to insist on payment of her October dividends. These dividends being accounted for, Mrs. *Frazer* engaged to pay the £300 a year to her aunt, and the writers said that as soon as the money came to hand they were authorized to apply the same accordingly. They also said that Mrs. *Frazer* had some reason to think that her husband had privately already paid £150 to the

aunt, and if so, that they were authorized to repay him the amount; and on the 24th of May the money was accordingly sent.

On the 23rd of September following Messrs. *Clarke, Son, & Rawlins* wrote to Mr. *Somers Clarke* as follows:—

"We have a note from Mrs. *Frazer*, asking you to make application to Mr. *Frazer*, through you, for his consent to her trustees finding a better investment for the money in her marriage settlement now in the funds. She asks us to point out to you that she pays her aunt £300 a year, and that residing abroad she has to expend more than she should have to do in *England* for the same amount of comfort. We are apprehensive that if this application be not favourably accepted, Mrs. *Frazer* will be compelled to reduce her aunt's allowance to £150 a year as long as she is compelled to reside abroad.

"Although we quite admit that Mrs. *Frazer* is not entitled to ask the favour at her husband's hands, more especially if it be in any way to his prejudice, yet, as the money comes from her family, and Mr. *Frazer* cannot be at all prejudiced by acceding to her wish, we trust that he will kindly give his consent." . . .

On the 18th of October following Mr. *S. Clarke* answered:—"Mr. *Frazer* will not raise any objection to the settlement money in the funds being invested on mortgage for a better rate of interest, with a view to secure to Miss *Norris* the allowance of £300 a year."

On the 16th of December Mr. *S. Clarke*, in a letter to Miss *Norris*, said:—"In regard to the investment of the money so as to yield a better percentage and increase Mrs. *Frazer's* income, Mr. *Frazer* has consented to it; and I think the trustees cannot well refuse the joint request of Mr. and Mrs. *Frazer;* and if Mrs. *Frazer* will engage to pay you the £300 a year, I should think it would be a further inducement to them to do it."

In June, 1866, Mr. *Frazer's* solicitors threatened proceedings for a divorce, which were shortly afterwards abandoned.

In October of the same year, the subject of the change of security, and of providing a permanent income for Miss *Norris*, was again referred to; and on the 25th of March, 1867, Mrs. *Frazer* wrote to Mr. *S. Clarke* to say she was quite determined not

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to do anything for her aunt unless her own income was increased, and that if he (Mr. *Clarke*) would pledge himself to re-invest the £13,000 then in the funds, and the £6000 mortgaged to Mr. *Frazer*, as soon as the dividends should be paid next month she would give her aunt at once sufficient for her present wants, and allow her £200, from the 1st of May, yearly.

To this the solicitor replied; and on the 28th of March, Mrs. *Frazer* again wrote to Mr. *Somers Clarke* as follows:—"Thanks for your so promptly replying to my letter; and I am sorry to be obliged to trouble you again, but unless the £6000 is also re-invested I shall only allow my aunt £150 a year; therefore it is for Mr. *Frazer* to consider whether he will not thus indirectly contribute to my aunt's comfort, for he, conjointly with me, promised Mr. *Willis* on his death-bed to give my aunt £300 a year out of my father's estate, and of this estate he took one half. A very old friend of Mr. *Willis'*, who saw him shortly before his death, writes me thus: 'Considering the very large sum that Mr. *Frazer* has obtained through you, it does seem to be the height of meanness and injustice to make believe that any conduct of yours can absolve him from keeping faith with the dead.' And, as long as Mr. *F.* compels me to be his wife, I fully agree with the writer."

In answer, Mr. *Clarke* observed that a large portion of the unsettled part of Mr. *King's* property had been spent by Mrs. *Frazer;* that she had had the control of the bankers' account; that the question was one of "contribution out of income from what is left of your father's property," of which Mrs. *Frazer* had had the larger portion, and the writer could not see that Mr. *Frazer* and she stood in equal position to Miss *Norris*.

In reply, on the 30th of March, Mrs. *Frazer* said she admitted the question was one of "contribution out of income from what is left of my father's property," and repeated her promise, that if the re-investments were made as requested, she would give her aunt £200 a year; and nothing would convince her but that Mr. *Frazer* was bound indirectly (as he would not directly) to contribute.

Shortly after Miss *Norris* wrote to say that £150 a year would not be sufficient for her, and that her niece had promised to allow her £200, if her (Mrs. *Frazer's*) money were re-invested; and Mr.

S. Clarke replied, that, with the understanding and engagement on Mrs. *Frazer's* part to allow Miss *Norris* the £150 a year, he would endeavour to get the trustees to invest the money so as to produce a larger income.

This change was afterwards made, and the greater part of the £27,000 New £3 per Cents was sold out and invested in securities yielding a higher rate of interest.

In March, 1869, Miss *Norris* filed the present bill against Mr. and Mrs. *Frazer* and *John Witt*, stating the will of *G. W. Willis*, alleging that the testator *Willis*, after the execution of his will, informed Mr. and Mrs. *Frazer* that he had conferred large benefits on them by his will, and "expressed to them his desire" that they should "thereout" make a provision for the Plaintiff of £300 a year from the testator's death; that each of them "promised and agreed with the testator to carry such desire into effect," and that "the testator communicated to the Plaintiff such promise and agreement." Further, that the trustees of the will had, out of the residue, appropriated a sum of £6500, or thereabouts, and invested the same on mortgage, for the express purpose of paying the annuity of £300 a year during the Plaintiff's life; that the Plaintiff had received "from Mr. *Frazer*, or by his order, as the acting trustee" of the will, "and in pursuance of the trust in the Plaintiff's favour," the annuity of £300, by quarterly payments, from the decease of the testator to the 27th of February, 1865, but not since; and that Mr. *Frazer* had received all the income of the residuary real and personal estate of the testator *Willis*, since the last date, up to the 5th of October, 1868, and had retained the arrears of the annuity for his own use.

The Plaintiff submitted that the Defendants, Mr. and Mrs. *Frazer*, accepted the benefits conferred on them by the will of *Willis*, upon a bargain made by them with the testator, under the circumstances thereinbefore stated, that they should, "out of their respective interests under the residuary devise and bequest, or otherwise," make up to the Plaintiff a provision of £300 a year; that such benefits were left unrevoked on the faith of such bargain; and that, if such bargain had not been made and relied on by the testator, he would have executed a legal disposition in the Plaintiff's favour to the effect of the above trust.

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The bill prayed for a declaration, that the income of the residuary real and personal estate of the testator *Willis*, and of the investments thereof for the time being payable to Mrs. *Frazer*, or to Mr. *Frazer* in her right, "was and is subject to a trust" for paying to the Plaintiff the annual sum of £300 during Mrs. *Frazer's* life, if the Plaintiff should so long live; also for an account of the arrears due to the Plaintiff, and that Mr. *Frazer* might be decreed to pay to her the sum which should be found due.

The executor *John Witt* filed an answer on the 7th of May, 1869, in which he admitted the appropriation of the sum of £6500, or thereabouts, but denied that it was appropriated in recognition of a trust in favour of the Plaintiff, or of a trust impressed upon the residuary estate. He had not, nor had any of his co-trustees by his order or with his authority, paid the alleged annuity to the Plaintiff; but he admitted that Mr. *Frazer* had, by his authority, and with his knowledge and consent, received the income of the residuary real and personal estate from the 27th of February, 1865, to the 5th of October, 1868.

Mr. *Frazer*, by his answer, filed the 9th of June, 1869, said that he had very few interviews with the testator *Willis* during his last illness. At none of such interviews was any mention made to him by *Willis* of his will or the contents thereof, except that *Willis* "in a casual way, and to the best of my belief on one occasion only, mentioned to me that he had left to me and the said *Georgiana Clara Frazer* the bulk of what had come to him from the said *Charles King*." The principal part of *Willis'* estate and effects at his death consisted of the legacy of £8000 bequeathed to him by *Charles King*, and Defendant denied that *Willis* expressed to him or to Mrs. *Frazer*, or either of them, his desire that he and she, or either of them, should, "out of any benefits or benefit which he had conferred upon us or either of us by his said will, or otherwise," make a provision for the Plaintiff of £300 a year for her life.

The whole of the income to which the Defendant and his wife were entitled was always paid to Defendant's general account with *Hall & Co.*, of *Brighton*, and Defendant always allowed Mrs. *Frazer*, prior to her elopement, to draw cheques against his account, which were always honoured by the bankers. "Some

arrangements were made by her, with my concurrence, for Messrs. *Hall & Co.* to make payments to the Plaintiff," after the Plaintiff had gone to *London* to reside. "Such payments were, I am informed and believe, made by quarterly remittances by Messrs. *Hall & Co.* to the Plaintiff, and amounted to £300 a year, and were purely voluntary payments."

Since the elopement, the Defendant, considering that Mrs. *Frazer* was entitled for life, for her separate use, to the income of the £27,000 stock, and of the £10,819 13*s.* 6*d.* stock, and to the freehold house, had not felt willing to make her any allowance; but the Defendant had, from time to time, since occasionally paid to the Plaintiff, who represented herself to be in need, sums of £10 or thereabouts. Such payments were made voluntarily, and without reference to any annuity. Defendant had been informed that since the elopement Mrs. *Frazer* had, out of her own income, paid to the Plaintiff certain sums for her maintenance and support. Defendant positively denied the alleged bargain with the testator *Willis*, but said he believed the testator told Mrs. *Frazer* that the Plaintiff had been left to her care, and that she must provide for her. He denied that he, or, to the best of his belief, his wife, was, previously to the testator's death, cognizant of any expectation, wish, or confidence on the part of the testator, as to any provision being made for the Plaintiff. He said that he concurred in the change of securities for the express purpose, as requested by Mrs. *Frazer*, of increasing her income, and of thereby enabling her "to pay to the Plaintiff such allowance as she might be able or think fit to do."

Mrs. *Frazer*, by her answer, filed the 5th of August, 1869, said that the testator *Willis*, after the execution of his will, and shortly before his death, called her husband and herself into his room, and begged them to promise that they would make an allowance of £300 a year to the Plaintiff as long as she lived, and "this we both promised him to do, and such promise was forthwith communicated to the Plaintiff." She further supported the other allegations of the bill.

On the 20th of March, 1871, the bill was amended, and, as amended, alleged that the testator, shortly before his death, sent for Mr. and Mrs. *Frazer*, and "begged them to promise" that they

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would make an allowance of £300 a year to the Plaintiff, and that they "did so promise;" and repeated the former charges and prayer.

In answer to the amended bill, the Defendant, Mr. *Frazer*, denied this allegation.

Miss *Norris*, the Plaintiff, made an affidavit, in which she stated, that shortly before the testator's death he told her that *Arthur* and *Clara* had promised him to provide for her.

Mrs. *Frazer*, in an affidavit, deposed to a conversation to the same effect. She adduced, in confirmation, the following extract from a bill of costs of the then solicitors of Mr. and Mrs. *Frazer*, which had been produced under an affidavit of documents sworn to by Mr. *Frazer*:—"1861. April 29. Attending Mr. and Mrs. *Frazer* at the *Grand Parade*, conferring with them on the annuity for Miss *Norris*, and the best mode of providing for it."

She said that in 1864, after she had left Mr. *Frazer*, she heard he was about to take proceedings to obtain a divorce; and on that account, and not because she considered that there was any legal or moral obligation on her to pay the annuity of £300 to the Plaintiff, or at all events exclusively, nor because she considered that Mr. *Frazer* was not bound to pay it, she repaid to Mr. *Frazer* the two quarterly payments above referred to.

On behalf of Mr. *Frazer*, Mr. *Somers Clarke* deposed, that shortly before Mr. *Willis*' death he was in frequent communication with the parties, and the sum of £300 was named as "a proper allowance to be made out of the income of the estate of *Charles King*" to the Plaintiff, as Mrs. *Frazer's* aunt; but in none of such conversations was it ever mentioned that such sum would be provided otherwise than as a voluntary payment out of *King's* estate. He had an interview with Mr. and Mrs. *Frazer* after Mr. *Willis'* death and before his burial, "and it was then arranged" between Mr. and Mrs. *Frazer* that the annual sum of £300 should be paid quarterly by Messrs. *Hall & Co.* out of Mr. *Frazer's* account to the Plaintiff, and remitted to her in *London*.

Mr. *Frazer*, in cross-examination on his affidavit, deposed that on one occasion Mr. *Willis* told him that the Plaintiff was left to his niece's charge. Deponent was not sure that he did not speak on other occasions of a provision for the Plaintiff, but it was always

to the same effect. Deponent did not remember whether he made any observation in reply, but "distinctly" he "made no promise and gave no undertaking to provide for the Plaintiff." Deponent had no recollection of hearing Mrs. *Frazer* on some of these occasions say that she would provide for the Plaintiff. He could not state his belief one way or the other as to whether she did say so in his presence or not. He could not say whether or not, if she did say so, he ever expressed any dissent. He did not believe that he ever assented or dissented. Upon being asked whether he would swear that he did not assent, he said, "I will not swear that I did not assent."

Mrs. *Frazer*, in cross-examination, admitted that after the change of securities she received more income. She added, "I did not continue to pay my aunt the £300 per annum. I believe I did not pay her more than one or two quarters at the rate of £300 per annum. When Mr. *Frazer* broke his promise to get a divorce I ceased to pay it."

She further said: "When I took these proceedings on behalf of Plaintiff through my present solicitors, my main object was to force Mr. *Frazer* to obtain a divorce, and that is my object in continuing them."

The Plaintiff was also cross-examined. She said: "I think my niece had told me that a Chancery suit was going on about this matter. I had not anything to do with the suit. . . . Mr. *Willis* was no relation of mine. He told me on his death-bed that Mr. *Frazer* and my niece had promised him that they would give me £300 per annum as long as I lived; and he said that he had made them promise that they would do so." She deposed to having, since February, 1865, received no money from Mr. *Frazer*, and only irregular payments from her niece—she thought never more than £300 in one year. "I do not remember that I ever suggested that I had any claims upon Mr. *Willis*' estate. I do not remember that Mrs. *Frazer* ever told me why this bill was filed. I wished for my money, and suppose she is trying to get it for me. I hope I am not responsible for any costs. I have not been able to take any part in the proceedings, because I have been ill for a long time."

The Defendant *Witt* had since died.

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Mr. *Eddis*, Q.C., and Mr. *R. O. Turner*, for the Plaintiff:—

The authorities which establish the law on this question are *Russell* v. *Jackson* (1), before Sir *George J. Turner*, then Vice-Chancellor; *Tee* v. *Ferris* (2), before Lord *Hatherley*, then Vice-Chancellor *Wood*; *Jones* v. *Badley* (3), before Lord *Cairns*, C.; and *McCormick* v. *Grogan* (4).

If, upon the evidence, the Court finds that the orally declared trust was communicated to and accepted by the devisee, it is enough. Here Mr. *Frazer*, when pressed, very fairly says, "I will not swear I did not assent."

As to the amendment in the bill, it was not till Mrs. *Frazer's* answer came in that the Plaintiff knew how high to put her case. The amended bill alleges that the testator asked them both to promise, and that they both did so promise; that is to say, in effect it alleges this, that if Mr. and Mrs. *Frazer* had not promised, the testator *Willis* would have altered his will.

The acceptance of the trust by Mr. and Mrs. *Frazer* as a settled obligation on both, is shewn by the extract from the bill of costs, and by the correspondence throughout.

The discrepancies between Mr. *Frazer's* answer and his cross-examination weaken the effect of his evidence.

Mr. *Swanston*, Q.C., and Mr. *W. Renshaw*, for Mr. *Frazer*:—

The Plaintiff is a mere nominal and unconscious suitor, subsidized by Mrs. *Frazer*, whose suit this is.

Nothing but the clearest evidence will suffice to fasten an orally declared trust upon property. The *onus* is therefore on the Plaintiff: *Jones* v. *Badley* (5). Lord *Westbury*, in *McCormick* v. *Grogan* (6), speaks of the jurisdiction in these cases as "founded altogether on personal fraud." Where is the proof of fraud against Mr. *Frazer*? The only witness is Mrs. *Frazer*, who institutes this suit in the name of the Plaintiff, and confesses her motives in so doing. Her evidence cannot be relied on when it is in conflict with Mr. *Frazer's*; and as to his evidence, all he meant to assent to was that Mrs. *Frazer* should provide for the Plaintiff out of the

(1) 10 Hare, 204.
(2) 2 K. & J. 357.
(3) Law Rep. 3 Ch. 362, 363.
(4) Law Rep. 4 H. L. 82.
(5) Ibid. 3 Eq. 635, 652.
(6) Ibid. 4 H. L. 97.

estate of *King*, not that the Plaintiff should be provided for out of *Willis*' estate, which yields only £208 a year. Whatever may be the obligation upon Mrs. *Frazer*, nothing can bind Mr. *Frazer* but a communication from *Willis* to him and a promise made by him to *Willis*: *Moss* v. *Cooper* (1). These are not proved.

Mr. *Kingdon*, for Mrs. *Frazer*.

Mr. *Cecil Russell*, for the executor of *Witt*.

SIR JAMES BACON, V.C.:—

This is an extraordinary case. The disagreeable part of it is that it is a sort of sham. It is impossible for me not to attend to what has been said about the disputes between the husband and wife, although I am wholly powerless to administer any law upon the subject, or to touch the subject at all. But it is clear and plain, upon the examinations and upon the evidence before the Court, that although this suit is instituted in the name of Mrs. *Norris*, it is, in point of fact, Mrs. *Frazer's* suit, as she admits. For the costs of the suit she says she is liable.

The only question for me to decide in the case between the parties here litigant is, whether the Plaintiff is entitled, as against Mr. and Mrs. *Frazer*, to establish the promise which is said to have been made by Mrs. *Frazer* and said to have been assented to by Mr. *Frazer*. The evidence, notwithstanding the statements in the bill, and the variance between the original and amended bill, is extremely simple. This gentleman being upon his death-bed, and having made his will, communicates to Mr. and Mrs. *Frazer* that he has left them all, or the bulk of, his property; and he either exacts a promise or expresses a wish and desire that an annuity of £300 should be provided for Miss *Norris*. Now it was not a new subject, as I gather from Mr. *Somers Clarke's* evidence; because he, in his evidence in chief, says that, upon several occasions, the subject of a provision for Miss *Norris* had been discussed and settled between the testator and Mrs. *Frazer*, and that the sum of £300 had been fixed for that purpose. That is a fact not to be lost sight of in considering the amount of evidence bearing

(1) 1 J. & H. 352, 366.

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upon this case. The statements by the husband and the wife differ, no doubt, very much, if I contrast Mr. *Frazer's* answer with the allegations of his wife. The wife says that the testator exacted from her and her husband a promise that they would provide £300 a year for Miss *Norris*. I am quite aware of what Mr. *Swanston* has pressed, that the allegation in the evidence is that payment was to be made out of *Charles King's* estate. Nevertheless, if a promise was made at all, it was made at a time when the testator was speaking of his own estate and his own intentions, and when he was imposing a condition—upon Mrs. *Frazer* at least—that she should perform that promise, or whatever it may be called, that £300 a year should be paid to the Plaintiff. The fund out of which it was to be paid is a matter of indifference. If he had said, "I will give you my estate on condition that you will pay £300 a year out of another estate," supposing she was a *feme sole*, that would not give her a right to retain the estate so given to her without performing the condition of paying the £300 a year out of some other estate; nor would it deprive the donee of the annuity of the right to say, "You shall not enjoy the estate without satisfying out of it my demand."

The evidence really comes to this. Mrs. *Frazer's* evidence is positive and plain. Mr. *Frazer*, whose conduct seems to have been frank and honourable and fair in every respect, was pressed in the cross-examination, and asked whether his wife did not make the promise, and whether his recollection did not enable him to say that she did so in his presence. Upon being asked further, he says, "I do not believe that I ever assented or dissented." Then, when he is asked, "Will you swear that you did not assent?"—there being only one subject to which his attention was drawn—he says, "I will not swear that I did not assent." Mr. *Swanston* has said very fairly that the *onus* in all such cases is upon the claimant. He has read, particularly from Lord *Westbury's* judgment in *McCormick* v. *Grogan* (1), the conditions as to what the Court has to see proved before it admits any such claim, and he says it must be proved that there was direct personal fraud, and that no personal fraud is proved, or even alleged, against Mr. *Frazer*. If the state-

(1) Law Rep. 4 H. L. 97.

ment made by Mrs. *Frazer* be true, then a more direct, a more distinct personal fraud could not be committed than for Mrs. *Frazer* to refuse to perform that promise which she made to the testator upon his death-bed. So far, therefore, the *onus* is discharged.

The other point which is most to be considered, as it seems to me, is this: Mr. *Frazer* takes an interest under the will only subject to his wife's life interest. All the rest that he takes he takes by his marital right; that is to say, he takes what she could take. If she is bound by this trust, he can take nothing free from the trust, and it is imposing no obligation upon him by way of a promise—about which the evidence is anything but satisfactory so far as he is concerned—it is imposing no obligation upon him, because he made a promise to hold that which he cannot enjoy in virtue of his marital right—the estate of this testator—without performing that promise by which his wife was bound, and by which, therefore, as a consequence, he must be held to be equally bound, to the extent of his enjoyment of that estate.

Now that, as it seems to me, disposes of the case, so far as this is a bill filed to have payment against both husband and wife out of the beneficial interest which they take under the testator's will. It is admitted by the wife that she is not entitled to it but upon performing the condition. The husband cannot dispute that. He cannot enjoy his wife's estate unless he performs the condition upon which it became hers.

To that extent, therefore, I think the Plaintiff has succeeded, and is entitled to a decree; but I cannot part with the case wholly upon that, and I will hear anything Mr. *Eddis* likes to say upon this part of the subject. It is plain, upon Mrs. *Frazer's* statements and cross-examination, and by her letters, and by every fact in the case, that this is her suit, although in the name of Miss *Norris;* that it is instituted by her, and that she is responsible for the costs of it if the Defendant, Mr. *Frazer*, does not pay them. So that, although, as I have said, I think the Plaintiff is entitled to a decree, it is a case in which it is impossible to give the Plaintiff any costs. The decree must be made upon the ground I have mentioned, and to the extent which the bill asks; that is to say, to make Mr. *Willis'* estate liable for the annuity of £300 a

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year; but I must make that decree without giving the Plaintiff any costs, although to that extent she nominally succeeds in this suit, which is Mrs. *Frazer's* suit.

There will be a decree as prayed by the bill.

[The bill also prayed relief in the event of Mrs. *Frazer* dying in the lifetime of Mr. *Frazer*, but his Honour said it was not necessary that the decree should extend to that.]

Upon the proposed decree for an account,

Mr. *Swanston* observed that Mrs. *Frazer* had been in the actual receipt of a very large portion of the estate, which really belonged by marital right to Mr. *Frazer*.

The VICE-CHANCELLOR said he could not meddle with that. He could not reach so far.

Mr. *Swanston* observed that Mrs. *Frazer* appeared separately, and if the Court should decide that one or both of the parties ought to pay the annuity, the decree ought to be made against both.

The VICE-CHANCELLOR said he was making a decree only against the estate which came from *Willis*, of which Mr. *Frazer* was the sole owner.

Mr. *Swanston* said that the house, *Lottery Hall*, part of *Willis'* estate, was given to Mrs. *Frazer* to her separate use. It was said that she had sold it. He asked that the sale moneys should be taken into account.

The VICE-CHANCELLOR said that she could not have sold the house without the consent of her husband, and he could not frame the decree in the way proposed. Mr. *Frazer*, however, would not be liable for more than the fund which was subject to this trust would yield.

Mr. *Russell*, for the executor of *John Witt*, asked that Mr. *Frazer* might be ordered to pay his costs, on the ground that the executor had a lien on the fund for such costs.

The VICE-CHANCELLOR said he thought the costs of Mr. *Russell's* client ought to be first paid out of the trust fund, whatever it was.

The following are minutes of the order:—

Declare that the income of the residuary real and personal estate of the testator, *G. W. Willis*, and of the investments thereof, for the time being payable to the Defendant *Georgiana Clara Frazer*, or to the Defendant *Arthur B. Frazer* in her right, was and is subject to a trust for paying to the Plaintiff the annual sum of £300 during the joint lives of the Plaintiff and the Defendant *Georgiana C. Frazer*;

Take an account of the income of such residuary real and personal estate received by the Defendant *Arthur B. Frazer* since the date of the last payment of the annuity in 1865;

Take an account of what is due to the Plaintiff in respect of the annuity since the date;

Out of the amount of the income so received by the Defendant *Arthur B. Frazer*, let the costs of suit incurred by the Defendant *Witt* be paid, and let the residue be paid to the Plaintiff in or towards discharge of what is so found due to the Plaintiff.

No other order as to costs.

Liberty to apply.

Solicitors for the Plaintiff and for Mrs. *Frazer:* Messrs. *Clarke & Turner.*

Solicitor for Mr. *Frazer:* Mr. *William Clarke*, agent for Messrs. *Clarke & Howlett, Brighton.*

Solicitors for the Executor: Messrs. *Shum & Crossman*, agents for Messrs. *Green & Moberly, Southampton.*

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[1873 T. 17.]

Building Society—Reference of Disputes between the Society and their Members to Arbitration—10 *Geo.* 4, *c.* 56, *ss.* 27-29—6 *& 7 Will.* 4, *c.* 32, *s.* 4—*Demurrer—Pleading.*

It is contrary to the language of the statute, and against the policy of the law, that internal disputes between the members or office-holders of a building society and the society should be the subject of actions at law and suits in equity.

Grimes v. *Harrison* (1) distinguished.

Smith v. *Lloyd* (2), and *Doubleday* v. *Hosking* (3), not followed.

A bill, filed by a member of a building society against the society, their

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(1) 26 Beav. 435. (2) 26 Beav. 507.

(3) *Post*, p. 344, n.

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trustees and directors, stated that the rules were duly certified, and were, "so far as material," as followed. It then set out certain rules, numbered 12, 13, and 14; but no rule as to referring disputes to arbitration. It set out a letter containing an offer by the directors to refer all matters in dispute between the Plaintiff and them to arbitration "under the rules," and stated that the Defendants sometimes alleged that the dispute ought to be referred to arbitration, but that the Plaintiff charged that, having regard to the relief thereinafter prayed, he was not bound to refer the dispute to arbitration, and prayed, amongst other things, that it might be declared that the Plaintiff was entitled to the benefit of the 12th and 13th rules of the society. The Act requires that the rules of every building society shall contain a rule for referring disputes to arbitration.

The Defendants demurred:—

Held, that the Court was able to take judicial notice of the rule of the society for referring disputes to arbitration, though it was not set out in the bill.

Where a Plaintiff alleged misconduct against the directors of a building society in extending the business of the society to that of a bank of deposit, but did not state when the extension was made, and prayed no relief on the ground of the alleged misconduct, the Court, on demurrer, treated the allegation as immaterial.

A bill by a holder of shares in a building society against the society and their directors alleged misconduct against the directors in respect of acts which, for anything that appeared, might have been authorized by the rules of the society as stated by the bill; prayed that the Plaintiff was not bound by certain new rules that had been passed; and prayed the benefit of certain of the original rules; and for relief against the directors personally:—

Held, that this was a dispute for the decision of which arbitrators were the proper authority; and demurrers by the society and by the directors allowed.

DEMURRER.

This bill was filed on the 18th of February, 1873, and amended on the 26th of February following.

As amended it was a bill by *Thomas Allen Thompson* against the *Planet Benefit Building and Investment Society*, and three trustees and six directors of the society.

The bill alleged substantially as follows:—

The society was established on the 7th of July, 1848, and enrolled under the 6 & 7 Will. 4, c. 32, but never incorporated. By the statute it was authorized to be sued by its trustees.

The rules of the society were duly certified on the 7th of July, 1848.

The bill alleged:

"Such rules are, so far as material, as follows:—

"4. The board of directors shall order the payment of all moneys due from or to be advanced by the society."

"12. Investment Shares.

"Investment shares shall be of two classes, viz., paid-up or part paid-up shares, and subscription shares.

"Any member may, with the consent of the directors, have allotted to him one paid-up share for every sum of £50 paid by him with entrance fee, and shall receive scrip for the same signed by two of the directors and the secretary.

"Any member may, with the consent of the directors, have allotted to him one part paid-up share by payment of £10 or more with entrance fee, to which additions may be made of not less than £5 from time to time until it shall become of the value of £50, when it shall be a paid-up share. All investments afterwards made by such member shall be first applied towards making his share a completed or paid-up share, and no member shall hereafter be registered as the proprietor of more than one part paid-up share, except such as have been already issued.

"13. Withdrawals.

"Any member desirous of withdrawing his investment shall be allowed to do so on giving one month's notice thereof in writing to the secretary. Any member desirous of discontinuing his subscriptions altogether without withdrawing his investments shall be permitted to do so, provided the same amount to at least £10, on giving one month's notice thereof in writing to the secretary; the investments previously paid, if amounting to £50 and upwards, being allowed to remain as a paid-up share, or as many paid-up shares as shall be equivalent, or if under £50 as a single part paid-up share of equivalent value, and scrip given in exchange for the subscription book accordingly, subject, nevertheless, to the provisions of rule 12 as to part paid-up shares. If several members shall give notice to withdraw at one time they shall be paid in rotation according to the priority of notice, provided always that the widows and children of deceased members shall have precedence, and after them the holders of paid-up shares.

"All fines incurred previously to the notice of withdrawal shall

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be deducted from the amount which the member may be entitled to receive.

"14. Interest and Profits.

"Interest at the rate of £5 per cent. per annum shall be added to all subscription shares of twelve months' standing and to all paid-up and part paid-up shares of three months' standing. Shares withdrawn within the above periods shall not be entitled to any interest.

"All shares of five years' standing (except as next hereinafter mentioned) shall be entitled to an equable proportion of nine-tenths of the profits which, as to subscription shares, shall be annually added to their value, but no profits shall be allowed on any fractional part of a year. The remaining tenth shall be carried to the credit of a fund to be called 'The Reserve Fund,' which shall accumulate and be appropriated as the directors may from time to determine, subject, nevertheless, to the approval of the ensuing annual meeting.

"No profit shall be allowed to any paid-up or part paid-up shareholder in respect of money which has not been invested in the society for at least twelve months."

"On the 19th day of September, 1871, Mr. *John Selley* was the duly registered proprietor of certain subscription and part paid-up shares in the said society in respect of which he had paid to the said society the sum of £597 16*s.* 2*d.* The said *John Selley* was also at the same date the proprietor of certain other shares in the said society registered in the name of *R. J. Dodson* in respect of which the said *John Selley* had paid to the said society the sum of £64 4*s.* 4*d.* The said *John Selley* was also at the same date the duly registered proprietor of certain shares in the said society in respect of which the said *John Selley* had paid to the said society the sum of £3."

On the 19th of September, 1871, *Selley* had invested with the society, £665 0*s.* 6*d.*

On that day he gave to the secretary notice of his intention to withdraw. The directors neglected to pay the £665 0*s.* 6*d.*, and on the 14th of December, 1871, *Selley* transferred all his interest in the shares to the Plaintiff.

On the 8th of March, 1872, the Plaintiff wrote to the secretary of the company, and on the 12th of the same month, he wrote again, asking whether the board would transfer the shares into his name, so that he might hold "the same position with regard to the withdrawal as the shares at present occupy" in the books; and a correspondence followed, at the close of which, on the 4th of October, 1872, the secretary wrote to say, that the society were prepared, on the transfer fees being paid and the transfer registered, to allow the Plaintiff to occupy precisely the same position as Mr. *John Selley* occupied. Upon this, on the 9th of October, 1872, the fees were paid and the transfers to the Plaintiff were registered.

On the 30th of December the Plaintiff wrote, demanding the money, and on the 2nd of January, 1872, he received from the secretary a cheque for £49 17*s.* 6*d.* with two documents; one being as follows:—

"The *Planet Benefit Building and Investment Society*,
"7, *Finsbury Square*,
"*London*, E.C.,
"August 24th, 1872.

"Rules 13 and 14, certified on the 28th of May, 1872.

"13. Any member holding an investment share or shares, may give one month's notice in writing to the secretary of his desire to withdraw from the society, and on the expiration of such notice he shall cease to be a member thereof, but he shall be entitled to receive dividends in respect of his investment shares, pursuant to rule 14, and to be paid the balance of the principal of his investment share or shares when the funds of the society will admit of it, in such instalments as the directors may determine.

"14. Until the income of the society shall be available for the purpose, no payments shall hereafter be made on account of interest or profits, but in the meantime the holders of investment shares shall receive such dividends, according to the amount of their respective investments and in part payment thereof, as the directors shall from time to time declare; the first of such dividends to be declared on the first Wednesday in August in 1872, the second on the first Wednesday in October, 1872, and thereafter half-yearly on the first Wednesday in April and October respectively.

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At least one half of the annual cash receipts of the society (after deducting all expenses) shall be applied to the payment of such dividends."

The other was a letter informing the Plaintiff that in pursuance of the above rule 14, the directors had declared a dividend of £5 per cent. payable to the holders of investment shares, and that the cheque for his dividend was inclosed.

Plaintiff paid the cheque into his bankers, but afterwards returned it with a letter stating that he had thought the money sent was for interest.

On the 27th of January, 1873, the Plaintiff's solicitors wrote for immediate payment of the £665 0*s.* 6*d.* and interest.

On the 3rd of February the solicitors of the company wrote, inclosing a copy of the directors' resolutions on the subject, and adding: "If you should be dissatisfied with their decision, the directors are ready and willing, and hereby offer, to refer all matters in dispute between your client and themselves to arbitration under the rules."

The following are the resolutions, of which a copy was inclosed:—

"1. That, several members having given notice for the withdrawal of their investments prior to Mr. *Thomas Allen Thompson*, his turn to be paid in rotation according to the priority of the notice has not yet arrived.

"2. That, for the purpose of calculating the value of his investment when his turn to be paid shall have arrived, Mr. *Thompson* should contribute rateably with the other shareholders to any losses which may arise out of the transactions of the society which took place prior to the date of his notice of withdrawal.

"3. That Mr. *Thompson* is not entitled to be paid interest on the investment in respect of the period subsequent to the 31st of August, 1871."

The bill alleged that on the 19th of October, 1871, according to the rules then in force, the directors were bound, out of the funds of the society, to pay to *Selley* the amount of his investment with interest, "subject to the right of any member of the society, who had given previous notice of withdrawal, to be paid the amount

of his investment in priority to the said *John Selley*;" but that, as a matter of fact, no member who had given previous notice of withdrawal was at that date unpaid.

The Plaintiff charged that the directors neglected, on account of the embarrassed state of the society's finances, to pay the £665 0*s.* 6*d.*

The bill also alleged that the payment in of the cheque for £49 17*s.* 6*d.* was made, in the hurry of business, by mistake; that the alleged new rules of the 28th of May, 1872, were passed without notice to *John Selley*, and that the Plaintiff never heard of them till the 2nd of January, 1873.

The Plaintiff charged that neither *Selley* nor he was bound by these rules.

The bill further alleged that the Plaintiff had given no notice of withdrawal under the above resolutions, and charged that he was entitled to the benefit of the notice of withdrawal of the 19th of September, 1871.

The bill then alleged as follows:—

"26. The Defendants, the directors, now threaten and intend, contrary to the rules of the said society, which formed the basis of the contract between the said society and the said *John Selley*, and under which the said notice of withdrawal dated the 19th of September, 1871, was given, to pay, and they have in fact paid, to members of the said society whose notices of withdrawal are dated after the 19th of September, 1871, all or some part of their respective investments in priority to the Plaintiff. The Plaintiff charges that the Defendants, the directors, are personally liable to make good and repay any sum so paid by them as last aforesaid which may be necessary for satisfying the Plaintiff's claim in this suit.

"27. The whole of the said sum of £665 0*s.* 6*d.* is now due to the Plaintiff with a considerable arrear of interest thereon, and the Plaintiff is apprehensive that such sum, or the greater part thereof, may be lost, in consequence of the payment by the Defendants, the directors, to members (who are subsequent to the Plaintiff) of their investments. The said society has, contrary to the terms of its constitution, carried on through its trustees and directors the business of a bank of deposit, by receiving money from the public

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on deposit at interest above the bank rate, and above the rate allowed by the joint stock banks, and by investing the money so received on securities of a hazardous or speculative character, in order to make a profit on the money so received.

"28. The Defendants sometimes allege that the dispute between the Plaintiff and the Defendants ought to be referred to arbitration, but the Plaintiff charges that, having regard to the relief hereinafter prayed, he, the Plaintiff, is not bound to refer such dispute to arbitration."

The bill prayed as follows :—

"1. That it may be declared that the Plaintiff is not bound by the said rules of the 28th of May, 1872, but is entitled to the benefit of the said 13th and 14th rules, as certified on the 7th of July, 1848.

"2. That it may be declared that the Plaintiff is entitled to the benefit of the said notice of withdrawal of the 19th of September, 1871, and to immediate payment out of the funds of the said society of the amount of the principal moneys paid to the said society in respect of the shares to which the said *John Selley* was entitled, and which were transferred to the Plaintiff as aforesaid, with interest thereon respectively at the rate of £5 per cent. per annum.

"3. That it may be declared that the Defendants, the directors, are personally liable to make good and repay any sum paid by them to members of the said society whose notices of withdrawal are dated after the 19th of September, 1871, so far as such last-mentioned sum may be necessary for satisfying the Plaintiff's claim in this suit.

"4. That an account may be taken of what is owing to the Plaintiff on account of such principal and interest, and that the Defendants, the directors, may be decreed forthwith to raise out of the funds of the said society the amount which shall be so found due to the Plaintiff for principal and interest, and to pay such amount to the Plaintiff.

"5. That the Defendants, the directors, may in the meantime be restrained by the order and injunction of this honourable Court from paying to any member of the said society whose notice of withdrawal of investment is dated subsequently to the 19th of

September, 1871, all or any part of the amount of his investment until the amount due to the Plaintiff as aforesaid shall have been paid, or until the further order of this Court;" with other relief.

To the bill, the society and the directors severally demurred for want of equity, want of jurisdiction, and want of parties.

Mr. *Kay*, Q.C., and Mr. *W. W. Cooper*, for the society and its trustees:—

This is a bill by a withdrawing member of a building society, seeking to recover payment of a simple contract debt. Where a bill is filed by a member who is also a mortgagor, seeking to redeem, the Court may have jurisdiction; but if it be a mere money claim by a withdrawing member, the Court has no jurisdiction. The intention of the Legislature was to keep these matters out of Court, and let them be settled by arbitration. The *Friendly Societies Act* (10 Geo. 4, c. 56), by its 27th section, requires that the rules of every friendly society shall provide that all matters in dispute between a society and any individual member shall be referred to arbitration, and a "form of award" is given in a schedule to the Act. This statute is extended to benefit building societies by the 4th section of the 6 & 7 Will. 4, c. 32; and is not repealed as to building societies by the 13 & 14 Vict. c. 115. By the 1st section of the last-mentioned Act, the provisions of the first *Friendly Societies Act*, so far as they relate to building societies, are expressly retained.

The decisions at common law have uniformly followed the above principle of legislation. They are: *Crisp* v. *Bunbury* (1); *Rex* v. *Mildenhall Savings Bank* (2); *Wright* v. *Deeley* (3).

In equity there have been *Harmer* v. *Gooding* (4); *Armitage* v. *Walker* (5); *Fleming* v. *Self* (6); *Trott* v. *Hughes* (7); the only reported case in favour of the jurisdiction of this Court being *Smith* v. *Lloyd* (8).

Independently of the statute, this Court does not entertain a suit for a simple contract debt which may be recovered in an action.

(1) 8 Bing. 394.
(2) 6 A. & E. 952.
(3) 4 H. & C. 209.
(4) 3 De G. & Sm. 407.
(5) 2 K. & J. 211.
(6) Kay, 518; 3 D. M. & G. 997.
(7) 16 L. T. (O.S.) 260.
(8) 26 Beav. 50.

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The charge that the directors have extended the business does not say when they did so. For anything that appears, they did so before Mr. *Selley* and the Plaintiff took shares; or they did so long ago, and have ceased to do so. No prayer for relief is founded upon this charge.

The suit, moreover, is defective, as the Plaintiff has not brought before the Court any of the members whose notices of withdrawal are dated since the date of his, and whom he alleges to have been paid in priority to him: *Carlisle* v. *South Eastern Railway Company* (1).

[They also cited *Cook* v. *Lord Courtown* (2).]

Mr. *Amphlett*, Q.C., and Mr. *Ingle Joyce*, for the directors:—

The frame of this suit and the prayer of the bill strongly illustrate the impolicy of permitting such a state of things as the Legislature intended to prevent. If this suit should succeed, any discontented member of a building society, in the absence of the rest, may file a bill, and possibly get a decree against the society, the assets of which would thus be wasted away in litigation.

Taking the allegations of the bill as they stand, there is no charge against the directors of their having done anything wrong. There is no allegation that the Plaintiff is the holder of a single paid-up share. For anything that appears, therefore, the members who have (according to the allegation) been paid before the Plaintiff, may have been rightly so paid, as being (rule 13) widows and children of deceased "members," or "holders of paid-up shares." Charges of misconduct must always be taken most strongly against the pleader.

Smith v. *Lloyd* (3) was decided under a misapprehension that the 10 Geo. 4, c. 56, had been wholly repealed. If reliance was placed on the case of *In re St. George's Building Society* (4), a winding-up of a society is a very different thing from an adjustment of claims of members *inter se*.

[They also referred to *Swarbrick* v. *Williams*, before the Court of Queen's Bench, Feb. 10, 1866.]

(1) 1 Mac. & G. 689; 2 H. & T. 366; 6 Railw. Cas. 670.
(2) 6 Ir. Eq. Rep. 266.
(3) 26 Beav. 507.
(4) 4 Drew. 154.

Mr. *Swanston*, Q.C., and Mr. *Graham Hastings*, for the bill :—

The decisions in the cases cited turned every one upon the construction of a particular arbitration clause in the society's rules. Upon this record no arbitration clause whatever is before the Court.

Even if there were such a clause in this case, the Court will not overrule *Smith* v. *Lloyd* (1).

In many of the existing building societies the jurisdiction of the Court is excluded by the rules, and in each case the Court has had to determine whether or not a reference to arbitration is within the terms of the contract. Here, we submit, the 13th rule, providing that members who have given notice to withdraw at one time "shall be paid in rotation," is a contract sufficient to give the Court jurisdiction. Payment out of moneys which may exhaust all the assets is a very different thing from a dispute about five shillings.

As to the directors: are they not answerable for a breach of trust in passing and attempting to enforce these new rules? That is one question. Another is, whether they have not exceeded their powers by becoming a bank of deposit.

The provisions in the Friendly Societies and Benefit Building Societies Acts were enacted at a time when these companies consisted wholly or mainly of poor persons. But societies which have altered their character, and enlarged their operations by becoming banks of deposit, are no longer building societies within the intention of the Legislature and the scope of the statute.

All the cases that have been cited turn upon particular arbitration rules and special circumstances. We do not ask the Court to overrule a single authority. *Mullock* v. *Jenkins* (2) is an authority to shew that parties cannot by contract oust the jurisdiction of the Court.

This is much more than a mere money demand, or than a mere *quia timet* bill; we allege a past breach of trust, and an active breach of trust about to be committed.

We say then—1. No statutory jurisdiction has been established; all that the statute does is to give authority to create a jurisdiction by means of rules. 2. The rule of this society as to arbitration is non-existent for the purposes of this argument.

(1) 26 Beav. 507.

(2) 14 Beav. 628, 634.

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3. Where there are rules, it is a matter of discretion, depending partly on the construction of the rules, partly on the circumstances, whether the Court will retain or renounce its jurisdiction. 4. It will retain its own jurisdiction, first, where the Plaintiff sues on a covenant or mortgage: *Fleming* v. *Self* (1); secondly, where there is an attempt to impose *ex post facto* rules (which is this case): *Armitage* v. *Walker* (2); thirdly, where the directors are charged with committing a breach of trust (which is also this case): *Armitage* v. *Walker;* fourthly, where the rule contains no provision for enforcing the award in case of non-payment: *Cutbill* v. *Kingdom* (3); and fifthly, where (which is also this case) a withdrawing shareholder seeks to prevent others from being paid in priority to himself: *Smith* v. *Lloyd* (4).

In *Henry* v. *Great Northern Railway Company* (5), which was a suit by preference against ordinary shareholders in the company, the company and their directors alone were made Defendants. The company were considered to represent sufficiently the ordinary shareholders.

The answer to the objection for want of parties, consequently, is, that this is a claim against a whole company. Nor was it possible for the Plaintiff to make any one a Defendant out of a number of persons whose names he did not know.

The decision in *Smith* v. *Lloyd* was followed by the Master of the Rolls in a case of *Doubleday* v. *Hosking* (6).

(1) Kay, 518; 3 D. M. & G. 997.
(2) 2 K. & J. 211.
(3) 1 Ex. 494, 504.
(4) 26 Beav. 507.
(5) 4 K. & J. 1; 1 De G. & J. 606.
(6) Through the courtesy of the solicitors of the Plaintiffs in this case, and with the assistance of the reporter of the Rolls, the following note has been obtained:—

M. R. 1869. Nov. 8.

DOUBLEDAY *v.* HOSKING.

[1867 D. 132.]

THE bill was filed on the 14th of November, 1867, by *Charles Doubleday*, and, by amendment, by *Charles Doubleday* and *Ellen* his wife, against *Josiah Hosking* and four others, trustees of the *Second Equitable Permanent Benefit Building Society*, of *Liverpool*. After stating the facts of the formation and registration of the society, and several of its rules, the bill set forth that, the first Plaintiff being in right of his wife the owner of fifty shares of £10 each in the society which the Plaintiffs had fully paid up, they, on the 20th of February, 1869, gave notice of withdrawal. It then alleged that upon the expiration of one month from the date of the notice, the first Plaintiff became entitled to receive £500 from the society,

The directors sufficiently represent their own *cestuis que trust* for the purpose of being sued.

Supposing, however, that a rule about reference to arbitration

and that the society, notwithstanding frequent applications, had neglected and refused to pay; and prayed for a declaration that the first Plaintiff was entitled forthwith to receive out of the property of the society the net amount of subscriptions paid on the fifty shares, with interest at £5 per cent. from the time when the Defendants could and ought to have repaid the amount, and for an account of what was due; also for an account of the property, funds, and assets of the society in the hands of the Defendants, and that the Defendants might be ordered thereout to pay to the first Plaintiff what was due; for an injunction to restrain the Defendants from paying any of the moneys of the society to any other withdrawing member, or from lending any of such moneys to any continuing member on any security until the amount due to the first Plaintiff should have been paid; and, if necessary, for an inquiry as to whether any and what notices of withdrawal had been given by any members prior to the Plaintiffs' notice.

On the 11th of January, 1868, the Defendants answered. They set forth an outline of the scheme of the society, and certain other of its rules, and submitted whether the trustees of the society for the time being were authorized to defend any suit in equity concerning the property of the society, and any claim of its members, and whether they could be sued in their own proper names as trustees of the society. They submitted that the present suit was not a suit in equity concerning "the property, right, or claim of the society," within the 21st section of the 10 Geo. 4, c. 56; and that they did not, either as such trustees as aforesaid or otherwise, represent, for all the purposes of the present suit (as the same was at present constituted) the society and its members. They then stated that the fifty shares, to which they presumed the bill referred, were transferred into the name of the Plaintiff's wife by her father-in-law, by whom all the subscriptions were paid, and were still standing in her name, and that the notice of the 20th of February was signed by both the Plaintiff and his wife; denied that the Plaintiff, at the expiration of one month, became entitled to receive payment, inasmuch as the rules provided that such payment should be made only after there were funds available for the purpose; and stated that before the institution of the suit they had frequently informed the Plaintiff that as soon as any moneys of the society, available for the purpose, came into their hands, they would immediately pay him in his proper rotation; but that they had no available funds. They said they believed that within six months they should have funds properly available for such purpose; and proceeded to state what their income had been since the 20th of February, 1867, and how it had been appropriated. They then set forth the 97th rule of the society, which provided for the settlement of disputes by arbitration; submitted that this was a dispute within the meaning of the rule; and insisted that the Plaintiff was not entitled to maintain the suit, and claimed the same benefit as if they had demurred to the bill, or pleaded the several matters in bar of the bill, and to the proper parts of the relief thereby prayed.

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were before the Court, does the statute apply? The preamble of the 6 & 7 Will. 4, c. 32, shews that this is not a society within the 10 Geo. 4, c. 56, because it has carried on a totally distinct business, viz., that of a bank of deposit: *Grimes* v *Harrison* (1). They have forfeited the benefit of the statute, which applies only to building societies pure and simple.

Nor does the statute, when closely examined, exclude the juris-

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On the 9th of April, 1868, the bill was amended, as above mentioned, by making the Plaintiff's wife a co-Plaintiff, and the amended bill alleged that the members of the society were so numerous, that if they were all made parties it would be difficult, if not impossible, to bring the suit to a hearing.

Evidence was gone into, from which it appeared that on the 2nd of March, 1869, the Plaintiff, *Charles Doubleday*, was paid; and the only question, upon motion for decree, was as to the costs of the suit, depending upon the fact of whether or not the society had before the filing of the bill funds available to pay the Plaintiff.

Mr. *Jessel*, Q.C., and Mr. *Jackson*, for the Plaintiffs:—

It has been said that the rule as to arbitration ousts the jurisdiction of this Court; but this is not so: *Smith* v. *Lloyd* (26 Beav. 507).

The Defendants admit they had funds; but they say they were not available, because they preferred to appropriate them in reduction of a rate of interest in certain funds from 6 to 5 per cent. *Primâ facie*, by paying, they admitted themselves to have been in the wrong.

The MASTER OF THE ROLLS:—They proposed to have the question decided upon motion.

Mr. *Jackson*:—Yes; but upon materials which would have been conclusive against us. We were obliged to bring the cause to a hearing: *Morgan* v. *Great Eastern Railway Company* (1 H. & M. 78).

The MASTER OF THE ROLLS:—You ought, when the answer came in, to have said: "Let us look at your books and see whether the statements in your answer are correct." However, I will give you an inquiry.

Mr. *Southgate*, Q.C., and Mr. *Mounsey*, for the Defendants.

LORD ROMILLY, M.R., directed an inquiry, whether on or before the 14th of November, 1867, the Defendants, as trustees of the society, had in their hands money available for the payment of the Plaintiffs' claim; and adjourned further consideration, with liberty to apply.

The result of the inquiry was that the society had not before the filing of the bill any funds available to pay the Plaintiffs, and the Plaintiffs had to pay the costs of the inquiry.

Solicitors for the Plaintiffs: Messrs. *Makinson & Carpenter*, agents for Messrs. *Bretherton, Steinforth, & Bretherton, Liverpool.*

Solicitors for the Defendants: Messrs. *Bower & Cotton*, agents for Mr. *S. P. Brabner, Liverpool.*

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(1) 26 Beav. 435. 5 Jur NS 528

diction of the Court even in ordinary cases. It merely gives to the Court power to say: "This is a dispute which, under the circumstances, ought to be referred to arbitration."

An instance of where the Court could, notwithstanding the statute, interfere in the affairs of building societies, was that of a winding-up order, which, before the Act of 1862, could be made on petition, and was made in *In re St. George's Building Society* (1).

Mr. *Amphlett*, in reply:—

It must be admitted there is a conflict of authority. But the only two cases are those at the Rolls, against an otherwise uniform series of decisions both at law and in equity.

SIR JAMES BACON V.C.:—

In my opinion no case more important than this has occupied the attention of the Court. Benefit building societies are scattered over the whole of this empire. There is hardly a town of any importance, or even of small importance, which has not one or more of such societies. If I were to decide in favour of this bill, and against the demurrers, I should open the flood-gates of litigation, and ruin many, and distress many more, of the existing societies; and I should do so, according to my view of the case, directly against the words of the statute, and against the policy of the law as it is expressed in those words. It is quite clear that the statute, which I need not read (notwithstanding the comment upon them that they are intended for poor people), was intended to encourage, and at the same time to protect, benefit building societies; and a new law and new machinery are created for the purpose of carrying that object into effect. Of that new machinery a very plain feature is, that, assuming that the members of these societies will be numerous, and that many, perhaps all of them, will be poor, the object of the Legislature was, carefully to guard against the possibility of any internal dispute being—to use an expression, I think, of Lord *Hatherley* in one of the cases—made the means of dragging them into the Courts of Law or Equity.

Now in the several clauses which have been referred to, the

(1) 4 Drew. 154. 3 Jur. N.S. 683.

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words of the statute do, in the most express manner, carry that object into effect. The decisions at common law have adopted that policy, and given effect to those words. The decisions in equity, with the exception of those to which my attention has been called, and which create, to my mind, the only difficulty in the case, have all done the same thing; and, although in the mortgage case the suit was entertained because it related to a subject entirely beyond and not affected by the operation of the *Benefit Building Societies Act*, in all the other cases, without any exception, the principle is plainly recognised, that, if the dispute between the parties is an internal dispute only, it must be regulated by that provision which makes the arbitrators the conclusive judges and determiners of a dispute.

With that abundance of authority, and with that plain indication contained in the statute, in any case in which there is merely an internal dispute between the members of the society and the society itself, or any of the persons holding office in the society and the society itself, I should be bound to hold that I cannot open the doors of this Court to such a dispute; the Legislature having said that it shall be settled elsewhere.

I am greatly pressed by the decisions which have been referred to, pronounced by the Master of the Rolls. I need not say that I entertain the most sincere respect for any decision of the Master of the Rolls, and that I should not willingly go against anything which I found he had decided. But when I find that his decisions which are here invoked—plain as they are in one instance, and plainly against the demurrers which have been argued—are directly opposed to the decisions at common law and the decisions in this Court, I am not at liberty to hesitate in saying that I am bound by and must follow the other decisions, and must give force to the Act of Parliament as I read it, and as I conceive everybody else must read it.

The cases which have been mainly relied on are, first, the case of *Grimes* v. *Harrison* (1), which has no very direct application to the case before me. In *Grimes* v. *Harrison*, I find that the Master of the Rolls, having pointed out the distinction between a benefit building society and a freehold land society, says (2): "But this

(1) 26 Beav. 435. (2) 26 Beav. 442.

is quite clear, that in both cases the members must be bound by the rules constituting the society, to which they have become parties and upon which they have acted, and I am of opinion that it does not lie in the mouth of any member of the company to say, that the book of rules, certified by the barrister, does not contain the rules by which they are to be bound." The decision there goes upon a totally different point. Something had been done which was not consistent with the rules, or with the scope and intention of the society, and the decision turned entirely upon that. Having first decided that they were at liberty to invest money in the purchase of freeholds, the Master of the Rolls decided ultimately that the directors had committed a breach of trust in having contracted a purchase for £2300, which they had not the money to meet—that having given cheques for £800 when, at the time of entering into the contract, they had only £600 in hand, they were liable to replace the £800—and that the vendor was under no liability.

Another case, that of *Smith* v. *Lloyd* (1), is very much more to the purpose, and creates a very much greater difficulty, because there the bill was filed by a retiring member of a benefit building society against the trustees to recover his share. The bill was supported, and inquiries and accounts were directed, and it was held that the rule to refer to arbitration did not oust the jurisdiction of this Court in such a case. In the argument of that case reference was made by the Defendants' counsel to the case of *Trott* v. *Hughes* (2), and as much, I suppose, as is there printed was quoted from that case. In that case the argument states that a shareholder had given notice to withdraw, and the Court refused to restrain the directors by injunction from parting with the funds in their hands, on the ground of the Plaintiff having a primary lien upon them for the return of his subscriptons, or of an apprehended mismanagement of those funds. Lord *Cranworth* there used the words which I am quoting: "The Legislature, for the convenience of institutions of this kind, had provided a particular mode for settlement of disputes of this sort." Then he refers to the 33rd regulation of the society, made in compliance with the directions of the Legislature, by

(1) 26 Beav. 507. (2) 16 L. T. (O. S.) 260, 261.

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which the directors were enabled to decide disputes between the society and any of its members. If that decision were not satisfactory to both parties, then arbitrators were to be appointed. His Lordship added: "The case was one of a benefit society, regulated by rules made in pursuance of certain Acts of Parliament. By one of these it had been provided, that disputes as to the construction of the rules, or any other matter relating to the society, should be referred to arbitration. The Legislature had thus concluded the question by the appointment of a tribunal—a less expensive and more appropriate one." His Lordship said he thought that, in not complying with this rule, the parties had proceeded upon an erroneous principle. That statutory enactment, which is so referred to by Lord *Cranworth*, I do not find alluded to in the judgment in *Smith* v. *Lloyd* (1). I do not find that the judgment in *Trott* v. *Hughes* provoked a single observation from the Master of the Rolls. I cannot impute to his Lordship the intention of overruling *Trott* v. *Hughes*, and if he differed in opinion from Lord *Cranworth*, I cannot impute to him that he would not have said so, and have furnished the parties in the suit with a suggestion of some of the reasons why he differed. But I find that which I cannot help thinking (although it is a mere suspicion) must have had some influence upon the mind of the Master of the Rolls, to the extent of making him think it was unnecessary for him to consider Lord *Cranworth's* decision, namely, that it was stated to him that the Act of Parliament on which it was founded had been repealed. I find it reported that Mr. *Villiers*, in reply, said that the 10 Geo. 4, c. 56, has been repealed by the 13 & 14 Vict. c. 115, and a cursory inspection of the latter statute might possibly have led to that notion; but a closer examination shews that it has no such effect, but that the provisions of the 10 Geo. 4 remain still in all their original force. In the judgment of the Master of the Rolls, all that he says upon the subject is: "On looking into this case, I see nothing to oust the jurisdiction of the Court in these matters." Lord *Cranworth* had decided in the most express terms that the jurisdiction of the Court was ousted. No single observation is reported to have been made by the Master of the Rolls upon Lord *Cranworth's*

(1) 26 Beav. 507.

judgment. The judgment proceeds: "I am of opinion that the Court has jurisdiction, but whether the Plaintiff will ultimately succeed must depend on the result of the inquiries." Then the rest of the judgment only says that His Lordship thought he must direct the inquiries. Can I accept that to the extent to which it was tendered to me and urged very properly by Mr. *Swanston*? I read that an authority was quoted to the Master of the Rolls; and that it was stated to the Master of the Rolls that that authority (I do not mean actually in those words) was of no binding power, because the Act of Parliament on which it was founded had been repealed. I find what I cannot but consider an adoption by the Master of the Rolls of that last statement, and I must conclude that, in consequence of that statement, he found himself relieved from considering *Trott* v. *Hughes* (1), because he thought that the Act of Parliament had been repealed. For this reason, I do not feel myself so much bound by the case of *Smith* v. *Lloyd* (2) as I otherwise should have been.

But then the other case which has been referred to by Mr. *Graham Hastings*, of *Doubleday* v. *Hosking*, and which is a much more recent case, contained the two points—the objection for want of parties, and the objection founded on a very explicit, plain rule, providing for a reference to arbitration. That rule was set out, as I understood Mr. *Graham Hastings* to tell me, in the answer. What arguments were addressed to the Court, and in what terms his Lordship expressed his judgment, I have no means of ascertaining; but the decree, as Mr. *Graham Hastings* read it to me, is a plain decree overruling both the objections, in its effect directing the inquiries which ought not to have been directed if the objection as to arbitration had prevailed, and disregarding utterly the objection for want of parties.

Then I am in this position: I have to deal with a case in which I find an abundance of authority one way, on which side also my own judgment leans; and that is opposed only by one case, for, although I have mentioned two, I do not think, for the reasons I have given, that *Smith* v. *Lloyd* can, in justice to the Master of the Rolls, be fairly and properly considered as a decision on the point. It is said that I must adopt that case in opposition to all the others. I cannot do that.

(1) 16 L. T. (O. S.) 260. (2) 26 Beav. 507.

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I have only to consider whether, upon this record, a case is stated which comes within the principle of the decisions and the words of the Act of Parliament. I find that it states this, and this only. There is a dispute between a member of the society and the executive body of that society. That is the very case which the law meant should be submitted to arbitration, and disposed of as speedily and with as little expense as possible, because it will be recollected that the amount of the expenses is limited by the Act of Parliament.

The allegation in the bill is this: that the society was established in July, 1848, and was duly inrolled pursuant to the Act of Parliament of the 6 & 7 Will. 4, and that the rules of the society were duly certified by the barrister appointed for that purpose on the 7th of July, 1848, which is the very day on which the society was inrolled. It has been truly said, that the statute leaves no option to the parties as to the rules, and that it imperatively requires that there shall be this rule about arbitration. As a matter of pleading, therefore, am I at liberty to doubt that this record is to be read as if the rule upon the subject of arbitration was set out? It has been urged by Mr. *Swanston* with great force, and the argument is entitled to great consideration, that in the common law cases, and in some of the other cases, the rules were set out at length, so that the Court had an opportunity of considering them, and that that is wanting in this case. I should be very slow indeed, under these circumstances, to furnish such a recipe for filing bills against benefit building societies as would be furnished if I were to hold that the allegation of a society's rules, stated to be duly certified, but not setting out that rule which the statute says shall be an indispensable rule in all cases, is sufficient to maintain a bill. It is not necessary to pursue that very much further, because in a letter set out in the bill I find, on the part of the directors, this sentence: "If you should be dissatisfied with their decision, the directors are ready and willing, and hereby offer, to refer all matters in dispute between your client and themselves to arbitration under the rules." The only other reference which is made to that subject is in the 28th paragraph of the bill: "The Defendants sometimes allege that the dispute between the Plaintiff and the Defendants ought to be referred to arbitration; but the Plaintiff charges that, having regard to the relief hereinafter

prayed, he, the Plaintiff, is not bound to refer such dispute to arbitration." That makes it necessary, for the purpose of understanding the Plaintiff's contention and the form of relief which he prays, to refer to, amongst others, the rule about arbitration.

Apart from this, an attempt has been made to shew that there is a charge in this bill which would sustain it—I mean that contained in the 27th paragraph—the effect of which is to shew that this benefit building society has so enlarged its borders as that it has become a society of a different kind—namely, a bank of deposit. If any relief had been prayed as to that, that charge would have had to be considered; but as it is, I read it as the most harmless and immaterial allegation that can be conceived.

First, the Plaintiff says (par. 37) that he "is apprehensive that such sum, or the greater part thereof, may be lost, in consequence of the payment by the Defendants, the directors, to members (who are subsequent to the Plaintiff) of their investments." His apprehension, of course, does not give him a right to sustain this bill. He continues: "The said society has, contrary to the terms of its constitution, carried on, through its trustees and directors, the business of a bank of deposit, by receiving money from the public on deposit at interest above the bank rate and above the rate allowed by the joint stock banks, and by investing the money so received on securities of a hazardous or speculative character, in order to make a profit on the money so received." This society was established in the year 1848. What is here alleged may have been done long before Mr. *Selley* or the Plaintiff became members of the society. I am not going to speculate whether such business was or was not carried on as alleged, or whether it has been discontinued; but I say that I cannot even read that as an allegation that the directors are now doing the thing at which that complaint is pointed. When to that is added that there is no prayer for relief founded upon this allegation, I must say I consider it wholly immaterial.

Then what remains? If the bill be read through, it says in effect simply this: "I became, in October, 1872, the registered owner of certain shares." They had been transferred to him. He was the equitable owner the year before. He could only take them subject to the rules. He could claim nothing beside, or beyond, or in contradiction to the rules. He says, in effect, "I

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became the owner in 1872. I claim the benefit of the previous notice of withdrawal which had been given. I say that the payments which have been made were made in contravention of my right." If the 26th paragraph of the bill be read, it will be found that that is an insufficient allegation; for, according to the rules quoted, the widows and children of deceased members have the first right to be paid, and next to them the holders of paid-up shares; and the allegation that some members, whose notices of withdrawal are dated after the 19th of September, 1871, are about to be paid, or have been paid, before the Plaintiff, points out no kind of delinquency on the part of the directors, nor even suggests a necessarily just cause of complaint before the arbitrator, if the matter were referred to arbitration.

In my opinion the proceeding has been altogether erroneous. I think that, taking at the most the complaint which this gentleman makes, giving to it its full weight, and adopting every word which he uses in the way of complaint, or in the way of expressing his complaint, this is a case which, according to the statute, the policy of the law, and the decided cases, he ought to have insisted upon having decided by the arbitrators who had power to decide. The law having given the arbitrators power to enforce their award, there was no necessity in this case for the Plaintiff to have filed a bill; and I should be greatly alarmed if a suit of this kind could be entertained by this Court, because I am certain that the effect would be to do incalculable mischief, and to plunge the affairs of benefit building societies into those very dangers and difficulties from which it was the plain and express object of the Legislature to protect them.

I think, therefore, that the demurrers must be allowed.

Mr. *Swanston* observed that, as there was a conflict of decision, he presumed his Honour would allow the demurrers without costs.

THE VICE-CHANCELLOR:—I think that, as there is a conflict of authority, and I have been compelled, with great reluctance, to decide against a very deliberate decision upon the points that have been argued, I ought not to give any costs.

Solicitors for the Plaintiff: Messrs. *Harper, Broad, & Batteock.*
Solicitors for the Defendants: Messrs. *Ingle, Cooper, & Holmes.*

In re BATEMAN'S TRUST.

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1873

Feb. 17, 18; *March* 1.

Forfeiture for Felony — Old Law — Personal Estate — Vested but defeasible Reversionary Interest — Minority of Felon — Conviction for Felony in a Colony — Royal Prerogative.

A stock legacy, and a share of residuary personalty expectant on the death of a tenant for life, bequeathed to a minor, payable at twenty-one, with a limitation over in the event of his death under twenty-one:—

Held to be interests which, prior to the 4th of July, 1870, were forfeitable to the Crown on the conviction of the minor for felony.

On petition by the Attorney-General for payment to the Crown of personal property of a felon:—

Held, that a conviction in *New South Wales* was sufficient to support the petition.

PETITION.

Thomas Bateman, of *Newington*, by his will, dated the 13th of May, 1814, gave (amongst other legacies) to his grandchildren *Alfred Bryer* and *Arthur Blewert Bryer*, £3000 £3 per Cent. Bank Annuities, "to be transferred to each of them in equal portions of £1500 at their respective ages of twenty-one years." In case either of them should die under twenty-one years leaving lawful issue, testator gave to such issue the £1500 stock in equal portions; and in default of such lawful issue he gave the said legacy to the survivor. In case both should die under twenty-one without lawful issue, he gave the whole of the £3000 stock to his daughter *Mary Bateman*. He directed that, upon the decease of his wife, the residue of his property not theretofore disposed of should be equally divided betwixt his daughter (*sic*), to whom he gave one moiety, and the other moiety he gave to be equally divided betwixt his grandsons *Alfred* and *Arthur B. Bryer*, "subject to the same contingencies" as he had before given to each of them £1500 £3 per Cent. Bank Annuities. He appointed his wife during widowhood, his daughter *Mary Bateman*, and his son-in-law *Robert Bryer*, his executors.

By codicils to his will the testator increased the above bequest from £3000 to £4000 Bank Annuities.

The testator died on or about the 14th of March, 1820, and his will was proved on the 20th of March, 1820, by his widow.

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On the 7th of April, 1825, *Alfred Bryer* (who was born in 1805) was convicted of robbery at the *Old Bailey*, and on the 30th of June, 1825, was ordered to pay a fine of 1*s.* and to be imprisoned until payment. There was evidence to shew that this was done on condition of his being sent to *Botany Bay*. He went to *New South Wales*, and arrived in the colony in the year 1825 a free subject. He never returned to this country.

In the colony he underwent three convictions; one for forgery, on the 13th of November, 1826, for which he was sentenced to three years' imprisonment; a second for forgery, on the 6th of June, 1829, for which he was sentenced for seven years; and a third for larceny, on the 12th of July, 1837, for which he was sentenced for seven years.

On the 28th of December, 1837, the testator's widow died; and, the other executor having also died, on the 10th of February, 1838, administration with the will of *Thomas Bateman* annexed, was granted to *Mary Bateman*.

In 1838 *Mary Bateman* transferred the funds representing *Alfred Bryer's* legacy and share under the will into the joint names of herself and *William Smee*, and the dividends were accumulated by investments in their names in the like funds.

On the 14th of April, 1842, *Alfred Bryer* became entirely free, and obtained a certificate to that effect, dated the 16th of September, 1842.

Mary Bateman died on the 1st of October, 1847.

After her death *William Smee* continued to accumulate the dividends until his death on the 17th of November, 1858, after which date his executors, *Frederick* and *Alfred Smee*, continued the accumulations until shortly before the payment into Court aftermentioned.

On the 25th of May, 1872, letters of administration to the estate of *Alfred Bryer* (who was last heard of on the 30th of May, 1851,) were granted to his brother *Arthur Blewert Bryer*. Upon *Arthur B. Bryer* calling upon *William Smee's* executors to pay the funds representing the legacy and share of the late *Alfred Bryer* to him, they paid the funds into Court on an affidavit filed on the 17th of July, 1872. The funds so transferred by the executors into Court, and now standing in the name of the Paymaster-General

to the credit of "The Matter of the Trusts of the Bequests made by the will of *Thomas Bateman* in favour of his grandson *Alfred Bryer*," were as follows:

£4952 1*s.* 5*d.* Bank £3 per Cent. Annuities.

£7072 6*s.* 7*d.* Reduced £3 per Cent Annuities.

£407 8*s.* 3*d.* New £3 per Cent. Annuities; and

£79 1*s.* cash.

The Petition, which was presented by the Attorney-General, stated that the legacy and share of *Alfred Bryer* under the will were now represented by the first two of the above sums of stock and by the sum of cash; and that the third sum of stock represented various small sums of money which, in or before January, 1825, had been invested for the benefit of *Alfred Bryer* and *Arthur B. Bryer* in equal shares in the name of *Mary Bateman* and another person who died shortly afterwards, which sums were in 1827 reinvested with accumulations in £3$\frac{1}{4}$ per Cent. Annuities in the names of *Mary Bateman* and *William Smee*, and a memorandum made by *Mary Bateman* in May, 1827, was proved, stating that the fund had, with the assent of *Arthur B. Bryer* as to a moiety, been appropriated for the benefit of *Alfred Bryer* alone.

The Petition (to which the Respondents were *Arthur B. Bryer* and *Frederick* and *Alfred Smee*) prayed that, after taxation and payment of the costs of the Petitioner and the Respondents as between solicitor and client out of the sum of cash and, if necessary, the proceeds of a sale of a sufficient portion of the first sum of stock, the residue and the remaining two sums might be transferred to the account of the Assistant Paymaster-General and the solicitor for the Treasury, per Act 15 Vict. c. 3.

The only disputed questions of fact were, first, whether the sums represented by the £407 8*s.* 3*d.* stock were before the 7th of April, 1825, or not until 1827, the property of the brothers; and, secondly, whether a sufficient declaration of trust was made in 1827, so as to bind the moiety of *Arthur Blewert Bryer* in favour of his brother *Alfred*.

The Petitioner claimed the whole fund—as to all, except one moiety of the £407 8*s.* 3*d.* stock, by forfeiture to the Crown under the English conviction for felony; and as to that moiety, by forfeiture under the Australian convictions.

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The Respondent *Arthur Bryer* also claimed the whole. As to all, except the £407 8*s.* 3*d.* stock, he claimed as administrator to his brother, on the ground that the funds represented interests which were not liable to forfeiture. As to the £407 8*s.* 3*d.* stock, he contended that no appropriation of it for the benefit of the brothers was made until May, 1827. He claimed one moiety as his own, on the ground that no sufficient trust of it in favour of *Alfred* had ever been declared. He claimed the other moiety as administrator, on the ground that, being property in *England* of a felon convicted in *New South Wales*, it was not (under the late law) forfeitable to the Crown of *Great Britain*.

In the result the Court was of opinion, on the evidence, that the money represented by the £407 8*s.* 3*d.* stock really belonged to the two brothers before the date of the English conviction, and that no sufficient declaration of trust of *Arthur*'s moiety in favour of his brother *Alfred* was ever made.

Mr. *Hemming*, for the Attorney-General.

Mr. *Kekewich*, for the executors of *William Smee*.

Mr. *Swanston*, Q.C., and Mr. *Stirling*, for *Arthur Bryer*.

The evidence of the English conviction appearing to be incomplete, the Petition was ordered to stand over, with leave to amend, and adduce further evidence on this point.

March 1. Mr. *Hemming*, for the Attorney-General, on the amended Petition:—

The legacy to *Alfred Bryer*, and the gift of residue, were both vested in him at his grandfather's death; and the words as to attaining twenty-one only postponed the payment: *May* v. *Wood* (1). The legacy is not contingent as in *Stokes* v. *Holden* (2). All personal estate vested, whether in reversion or in possession, formerly passed to the Crown under a forfeiture for

(1) 3 Bro. C. C. 471. (2) 1 Keen, 145.

felony: *In re Thompson's Trusts* (1); and therefore the English conviction caused a forfeiture of everything taken under the will. The Australian convictions forfeited what was subsequently acquired, unless it is to be said that the Queen's prerogative does not run in a colony.

Mr. *Swanston*, Q.C., and Mr. *Stirling*, for *Arthur Bryer*:—

We are not concerned to say that the interest of *Alfred*, under his grandfather's will, was "contingent" in the strict sense of the word; it is sufficient that it was contingent in the sense in which the testator used the word "contingency." No doubt it was assignable in equity; but it is another thing to say it was forfeitable to the Crown. *In re Thompson's Trusts* was a simple case of tenant for life and remainderman, and *Stokes* v. *Holden* (2) supports our view.

We do not say that the Royal prerogative does not extend to the colonies; we say that forfeiture was not part of the Royal prerogative. The goods in this country of a felon convicted in a colony were not, under the late law, liable to forfeiture to the Crown of *Great Britain*. An emigrant to a colony does not take out with him all the statutory and customary law of the mother country; he takes with him only so much of it as is applicable to his own situation and the conditions of the colony: *Blackstone's* Comm. Introd. Sec. 4 (3), cited in *Attorney-General* v. *Stewart* (4). He does not take out with him, for example, the law of mortmain: *Whicker* v. *Hume* (5). Forfeiture would be peculiarly unsuited to a colony largely composed of felons.

Forfeiture for felony was not a part of the Royal prerogative; it was a customary law, based on a fiction peculiar to the feudal system, that a tenant's blood, on his committing a felony, became attainted. Thus, in cases of theft, a sheriff might sometimes take the goods of a felon for his own use: *Stanford* on Prerogative (6).

In *Yorke's* Considerations on the Law of Forfeiture (7), forfeiture is described as being an incident of feudal law. There is no absolutely undeviating rule that the goods of a felon pass to the

(1) 22 Beav. 506.
(2) 1 Keen, 145.
(3) Vol. i. p. 108 of the original paging.
(4) 2 Mer. 143, 159.
(5) 7 H. L. C. 124, 134, 150.
(6) Page 45.
(7) Pages 68, 69.

5 H & 4 Jur. N.S. 933.

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Crown; the rule is that they pass to the next lord, who may or may not be the Crown. In the instance of a colony, the goods of a convicted felon would pass to the Colonial Government, as the next immediate lord.

At least the Court will not decide in favour of the Crown without evidence of what was the law in the colony prior to the abolition of forfeiture for felony in 1870.

The colony must, for the present purpose, be treated as a foreign country; and the Crown of *Great Britain* does not pursue in foreign countries remedies created by the law of *England*: *Emperor of Austria* v. *Day* (1); *Story's* Conflict of Laws (2); *Folliott* v. *Ogden* (3). The penal laws of foreign countries are strictly local: *Ogden* v. *Folliott* (4).

The VICE-CHANCELLOR said he would not call for a reply on the first point.

Mr. *Henming*, in reply, on the question of forfeiture under the colonial convictions:—

It is said that the forfeiture of goods is a feudal incident and not part of the Royal prerogative. It is elementary knowledge that the forfeiture of goods rests solely on prerogative, and that the feudal system has nothing to do with it. There has been some question as to forfeiture of lands, though that also was really based on prerogative: *Blackstone's* Comm. (5); *Jarman's Bythewood* (6); *Chitty* on Prerogative (7). The same page of *Stanford* which was cited lays down the true rule as to felonies. *Yorke* is dealing throughout with forfeiture of lands, and there is not a suggestion to be found in any of the books to support the notion that forfeiture of goods depends on feudal tenure. If it did, it is as absurd to speak of the Colonial Government as a mesne lord as it would be to say that the Imperial Government is a mesne lord here. Whether the prerogative is to be asserted through those who represent the Crown here, or through those who represent it in *Australia*, is another matter; but, in fact, the rule is that the Crown

(1) 3 D. F. & J. 217.
(2) Chap. xvi. § 620; 7th Ed. p. 767.
(3) 1 H. Bl. 123, 135.
(4) In Error, 3 T. R. 726.
(5) Vol. ii. pp. 251, 299, 300, 420, 421 of the original paging.
(6) Vol. ii. p. 74.
(7) Pages 215, 222.

19 L.C. 7 Jur. N.S. 639.

takes forfeited goods found in *England* through its English officers, quite irrespective of the place where the conviction may have occurred.

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SIR JAMES BACON, V.C.:—

Considering the view of the evidence which I have formed and am about to state, I feel myself in some degree to blame in having allowed the discussion to be prolonged to such an extent as it has been.

Upon the first question, that upon which the case of *Stokes* v. *Holden* (1) has been cited as an authority, I cannot entertain the slightest doubt. Although the testator has spoken of the interest which he had bestowed upon his grandson as a "contingency," there can be no doubt that the interest conferred upon him was a vested interest, and that it was vested in *Alfred Bryer* at the date of his first, or English conviction. Everything that came to *Alfred Bryer* under his grandfather's will was his property at the time of his first conviction, and was forfeitable to the Crown; and therefore the Crown became, and now is, entitled to all the property that *Alfred Bryer* took under that will.

In the view that I take of the evidence, that does, in point of fact, cover the whole case; but if it were otherwise—if there were any doubt as to the facts—I cannot hesitate to say and to decide, that the Queen's prerogative is as extensive in *New South Wales* as it is here, in this county of *Middlesex*. It has been contended that the title of the Crown by forfeiture was confined to this soil—the soil of *England*. But the Queen is as much the Queen of *New South Wales* as she is the Queen of *England*, and I must hold that every right which the Queen possessed by forfeiture extended as much to the colonies as to this country.

As to the facts, it is now proved that it was not after, but before, the English conviction, that the appropriation in favour of *Alfred Bryer* took place—so that the effect of the conviction in the colony, in the result, has no bearing on the case; and what was wanting on the former occasion has now been furnished—namely, proof of *Alfred Bryer's* English conviction.

(1) 1 Keen, 145.

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With regard to what was suggested about some mesne lord claiming the goods of a felon on conviction, no doubt that may have been so, and has been so, in more instances even than have been referred to in the course of the argument. But no person can possess or exercise such a right as this, except by grant from the Crown, to be either proved or assumed from the particular circumstances of the case. There are abundant instances in which the rights of lords of manors—I do not say come into conflict with, but take the place of, the rights of the Crown; but all those instances must be referred to the existence of some grant, real or presumed. The cases which have occurred about claims to the sea-shore, Crown lands, and the like, sufficiently prove this. These claims have been established, not because the persons claiming were mesne lords, but because they had at some time or other acquired these rights by grant from the Crown.

I must hold, then, that the title of the Crown to all but the smallest of these sums of stock is clearly established.

As to this latter fund, the evidence adduced by the Crown does, in my opinion, establish a right to one moiety of it. I say this upon a review of the evidence which traces the origin of the fund, and the history of its appropriation. But as to the other moiety, I am of opinion that it belongs to the brother, the Respondent. The writing on the back of the document which has been produced satisfies me that *Mary Bateman* supposed at the time that *Arthur Bryer* had given up his half of the fund to his brother; but it does not satisfy me that *Arthur Bryer* intended to give it up. The writing at the back of this piece of paper in somebody else's hand can be no proof at all against *Arthur Bryer;* and he has never done any act inconsistent with his intention to remain, or with his being, the owner.

Upon the first point, if there were any doubt, it would be removed, not only by *In re Thompson's Trusts* (1), but even by the decision in *Stokes* v. *Holden* (2). In that case the legacy was charged on the testator's real estate, and was contingent on the legatee attaining twenty-one. Before the legatee attained twenty-one he was convicted of felony, underwent his full sentence, and

(1) 22 Beav. 506. (2) 1 Keen, 145.

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was discharged. It was held in that case that the contingent legacy, which did not vest till afterwards, did not pass to the Crown. But Lord *Langdale*, M.R., says (1): "I apprehend that no case can be found in which it has been held that any other than immediate rights (grantable or assignable) are subject to forfeiture." Now this was an interest clearly vested in *Alfred Bryer*, and clearly assignable in equity; and hence I must hold that the Crown is entitled to all that is claimed by this Petition except one moiety of the smallest of the three sums of stock.

Solicitors for the Petitioner: Messrs. *Raven & Bradley*, agents for the Treasury.

Solicitors for the Respondents: Messrs. *Freshfield;* Messrs. *H. F. & E. Chester.*

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[1870 B. 176.]

Company—Sale of Shares—Transfer to Infant—Vendor's Name on Register—Vendor a Trustee for Purchaser—Release and Indemnity.

Plaintiff, a registered owner of fifteen shares in a limited company, sold them through his broker on the *London Stock Exchange*, and 130 shares in the same company, which included the above fifteen, were bought by a broker on the *Exchange*, as agent for a firm of brokers in *Scotland*. The purchase-money was paid, and the name of *W. K.*, of *Aberdeen*, described as an "Esq.," was furnished as that of the purchaser. A transfer deed of fifteen shares from the Plaintiff to *W. K.* was executed by both parties, and registered, *W. K.'s* name remaining on the register till the winding-up, when it was found that he was a clerk in the employ of the Scotch firm of brokers, and an infant. The name of the Plaintiff having been restored to the register, and settled on the list of contributories, as the owner of fifteen shares, and calls having been made, he filed a bill against the Scotch brokers, who, by their answer, disclosed the names of four persons, their principals, *D.*, *E.*, *J.*, and *S.*, as the purchasers of thirty, forty, thirty, and thirty shares respectively in the company, which, however (except as to *E.'s* forty, which did not include the Plaintiff's fifteen), had not been appropriated.

Upon bill by amendment against the brokers and *D.*, *J.*, and *S.*, praying

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(1) 1 Keen 152.

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for a declaration that the fifteen shares were held by the Plaintiff as a trustee for *D.*, *J.*, and *S.*, and for release and indemnity:—

Held, that the Plaintiff was a trustee of the fifteen shares for the Defendants *D.*, *J.*, and *S.*, and release and indemnity of the Plaintiff by the Defendants ordered as prayed.

MOTION FOR DECREE.

The Plaintiff, *Thomas Davy Brown*, in May, 1864, was the registered owner of fifteen numbered shares (of the nominal value of £100 each, upon which £3 had been paid up) in the *Contract Corporation, Limited.*

In June, 1864, the Plaintiff, through his broker, sold fifteen shares on the *London Stock Exchange* for delivery on the 15th of June.

On the 6th and 7th of June, 1864, the Defendants, *James Black* and *Alexander Stephen*, of *Aberdeen*, brokers, through their broker, *James Pope Kitchin*, of *London*, bought on the *London Stock Exchange* 130 shares in the same company. The result of the transactions was that the Plaintiff's fifteen shares were included in the 130 bought by *Black* and *Stephen.*

Bought notes in the names of *Black* and *Stephen*, as purchasers, were sent, and *Kitchin* returned as the name, description, and address of the purchaser, "*William Keith*, Esq., 23, *King Street, Aberdeen.*" This name was inserted in a draft deed of transfer, in consideration of £75, of the fifteen numbered shares from the Plaintiff to *Keith*, and the deed was duly executed by both parties, and registered.

On the 23rd of April, 1866, the company was ordered to be wound up; the name of *Keith* was settled on the list of contributories, but the liquidator, upon inquiry, found that he was an infant, then about seventeen years of age, and a clerk in the employment of *Black* and *Stephen.* His name was thereupon removed from the register and list of contributories, and that of the Plaintiff restored in respect of the fifteen shares. Shortly afterwards an order was made upon the Plaintiff for payment of a call under which he became liable to pay £1425.

In November, 1869, *Kitchin* wrote to *Black* and *Stephen*, asking them to give the names of their principals, otherwise he should be compelled to give in their names to be substituted for *Keith's.*

In answer, *Black* and *Stephen* wrote to say the company had accepted *Keith* as a purchaser, and must abide by the selection they then made; and that it had been laid down that unless an objection was taken to a buyer's name within ten days, the seller of stock lost all remedy against any other person.

The bill was filed on the 8th of June, 1870.

On the 4th of November, 1870, *Black* and *Stephen* answered, and said that the 130 shares were bought for the following principals: thirty shares for *William Smith Dixon;* forty for *Robert Easson;* thirty for *Andrew Jopp;* and the remaining thirty for the private account of the Defendant *Alexander Stephen;* also that the forty shares so purchased for *Easson* had been since sold and transferred by *Keith;* but that no appropriation of the remaining ninety shares had been made among Defendants' principals.

The forty transferred shares did not include the Plaintiff's fifteen.

The bill was amended on the 24th of January, 1871, and as amended was filed against *Black* and *Stephen*, *Dixon* and *Jopp;* and prayed that it might be declared that the fifteen shares had been since the 14th of June, 1864, and still were, held by the Plaintiff as trustee for the Defendants *Dixon*, *Jopp*, and *Stephen*, and that accordingly these Defendants, as well as the Defendant *Black*, "by reason of the part which he took in the aforesaid contrivances," were bound to procure the release or discharge of the Plaintiff from the payment of all calls which since the 14th of June, 1864, had been made, or might thereafter be made, on such shares, and all interest in respect of such calls; and further to indemnify the Plaintiff against all costs, damages, and expenses in respect of such calls, or otherwise in respect of the fifteen shares: and that the Defendants might be ordered to procure such release or discharge accordingly.

The Defendant *Dixon* answered on the 17th of May, 1871. He said that in 1864 he instructed *Black & Co.* to purchase for him some shares in the company, and to sell the same as soon as they should reach an advanced price. Being already a shareholder to a large extent in the company, and having been a director, he did not wish it to be known that he was dealing in its shares; and

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accordingly he told the firm, or assented to their suggestion, that if it should be necessary to take a transfer of any shares they might purchase for him, they should take the transfer into the name of a fit and proper person, "as trustee" for him, who would deal with the shares according to the direction of the firm, acting under his instructions. He said he knew nothing of *Keith*, and had never before heard of his name. He denied that the transfer to *Keith* was executed pursuant to any directions of his. He had no reason to doubt that any consideration money payable in respect of the shares was debited by *Black & Co.* to his account. No appropriation of any of the ninety shares had been made to him, and no distribution of any of them had been made amongst him and any other persons. He then said, "Under the circumstances hereinbefore appearing, I submit and humbly insist that I was not at the time of the said purchase down to the sale of the forty shares in the bill in that behalf respectively alleged, or at any time, interested in the said fifteen shares, or any of them, as the true beneficial owner, or the owner of them; or that I have ever since such sale been, or am now, the true beneficial owner, or the owner, of the same or any of them." He denied that the Plaintiff, "under the circumstances herein set forth," or in the bill alleged, or in fact, became as from the 14th of June, 1864, or any other time, or still was, a trustee of the fifteen shares, or any of them, for him; or that he was bound in equity to indemnify the Plaintiff. He said that, "assuming and without admitting that any of the said 130 shares were bought by the said firm under my said instructions, the terms of the contract between the Plaintiff and the said firm . . . shew, as I insist, that it was the intention of the parties thereto that the said firm should be treated as principals in the transactions, and the Plaintiff is not at liberty to treat me as a principal therein;" and he repudiated all liability in respect of the fifteen shares.

It was proved that dividends had been received, and calls, prior to the winding-up, paid, upon the shares, by and on behalf of parties other than the Plaintiff.

All the Defendants were residing out of the jurisdiction. The Defendant *Jopp* filed an answer, but none of the Defendants appeared, except *Dixon*.

Mr. *Eddis*, Q.C., and Mr. *J. W. Chitty*, for the Plaintiff:—

The right of the Plaintiff to relief, and to relief in this form, is established by *Castellan* v. *Hobson* (1).

Mr. *Kay*, Q.C., and Mr. *Cobbold*, for the Defendant *Dixon*:—

The agents *Black* and *Stephen* exceeded their authority. The Defendant *Dixon* did not authorize the use of the name of this infant; and he is not bound by the wrongful act of his agents: *Udell* v. *Atherton* (2).

The only authority on the other side is *Castellan* v. *Hobson*. But in that case there was a contract. The man whose name was furnished as the purchaser was not an infant; he was a man of straw, no doubt, but not a person incapable of entering into a contract. The distinction is marked by Lord Justice *Mellish* in his judgment in *Merry* v. *Nickalls* (3). *Shepherd* v. *Gillespie* (4) also applies.

The Plaintiff does not attempt to allege that he sold these particular fifteen shares to the Defendant *Dixon*. His allegation amounts to this: "I and a number of others joined in selling to an infant named *Keith*." That contract has failed, and he must take the consequences. There never was a contract which could be distributed between us, *Dixon*, *Easson*, *Jopp*, and *Stephen*; and without a contract the Plaintiff cannot reach either of us.

He must seek his remedy against the brokers who were the wrongdoers, either through his own brokers, according to *Paine* v. *Hutchinson* (5), or directly, as if *Black* and *Stephen* had been jobbers, as in *Merry* v. *Nickalls* (6).

[They also referred to *Cruse* v. *Paine* (7); *Gooch's Case* (8); *Thompson* v. *Davenport* (9); *Smith* v. *Anderson* (10).]

SIR JAMES BACON, V.C.:—

Mr. *Eddis*, I will not trouble you to reply. It is a relief to me

(1) Law Rep. 10 Eq. 47.
(2) 7 H. & N. 172.
(3) Law Rep. 7 Ch. 733, 752.
(4) Ibid. 3 Ch. 764.
(5) Ibid. 388.
(6) Ibid. 7 Ch. 733.
(7) Law Rep. 6 Eq. 641.
(8) Law Rep. 14 Eq. 454; Ibid. 8 Ch. 266.
(9) Sm. L. C. 6th Ed. vol. ii. p. 212, 218.
(10) 7 C. B. 21.

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to find that *Merry* v. *Nickalls* (1) has nothing to do with the present case. I take that upon my own conviction and upon your representation, otherwise I should have paused before I pronounced any decision upon it. I am glad also to find that that which was embarrassing in *Merry* v. *Nickalls* to a certain extent, finds no place in this case—I mean the intervention of a jobber and the effect of the construction of the rules laid down by the *Stock Exchange* for regulating their business.

The case before me, when the real substance of it is considered, is as plain and simple a case as can be stated. The owner of shares desires to sell them upon the *Stock Exchange*, people present themselves there to buy, and the shares are sold and paid for—the goods are delivered. All that remains to be done is that the name of the person to whom the transfer is to be made should be furnished. That is done. The name is furnished, the transfer is executed, and the name of the purchaser is registered. The transaction there comes to an entire and complete end. Then at a later period it is discovered that the brokers, the persons in *Scotland* who had commissioned the broker in *London* to buy for them, have furnished the name of an infant, and that the registration is a mere nullity so far as he is concerned, and that, therefore, as between the company and the creditors of the company, and the liquidator in the winding-up, Mr. *Brown*, the original owner is still the owner of the shares. *Brown* is entered upon the list accordingly to bear his share of the liability and the responsibility which attach to the character of a shareholder. He is the owner of the shares; that is to say, he is the legal owner of the shares which he has sold, and for which he has been paid, and in which he has no interest whatever. A great burden attaches to them, but they are not his. The next question that presents itself is—Whose, then, are they? They are the shares of the person who bought and paid for them. Who are they? The Scotch broker in the first instance. But by their answer, and by the answer of Mr. *Dixon* (whose case alone I have heard argued), it is as clear that they were sent into the market in *London* to buy, on behalf and as the agents of Mr. *Dixon* and other persons, certain shares, as that they did buy them and pay for them. Mr. *Dixon's* answer

(1) Law Rep. 7 Ch. 733.

puts that beyond the possibility of doubt or question. The others are equally clear. He says in the sixth paragraph of his answer, "Some time in the year 1864 I gave instructions to the firm whom at the time I generally employed as my brokers, to purchase for me some shares in the said company, and sell the same as soon as they should reach a price in advance of that at which they should be bought," and so on; "but I desired that my own name should not appear." The question of principal and agent, therefore, is raised upon that statement, and there is abundance of other evidence and statement leading to the same conclusion. It is clear that the Scotch brokers were the regularly constituted agents for Mr. *Dixon* and other persons, to go and buy for them upon the *Stock Exchange*, and pay for the shares that they desired to acquire.

Mr. *Kay* refers me to the case of *Udell* v. *Atherton* (1). The principle there laid down is one which is perfectly well understood, namely, that an agent cannot act so as to bind his principal beyond the scope of the authority which has been conferred upon him. But here the act performed by the agent was precisely within the authority which was conferred upon him; and from the moment when the purchase was completed the shares belonged to the purchaser, no matter in whose name they were registered. Mr. *Dixon* desired that his name, of all others, should not be used. But what did it signify to Mr. *Dixon* in whose name they were? Whoever held them held them as trustee for him, whether he was under age or adult. They were his shares, he had paid for them, his agent had bought them within the scope of that agent's authority, and they are his. I do not perceive where the difficulty of the case is. In *Merry* v. *Nickalls* (2) there was plenty of difficulty. *Castellan* v. *Hobson* (3) presented difficulties of another kind. There is no difficulty in this case. The shares were bought upon the day mentioned, paid for on the day that all parties agreed upon, registered in the name furnished, but so registered as that that transaction was null; and they remain, therefore, registered in the name of the present Plaintiff, who has no more interest in them than any person who is now listening to me. Can there be any doubt that upon principles

(1) 7 H. & N. 172. (2) Law Rep. 7 Ch. 733.
(3) Law Rep. 10 Eq. 47.

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universally established, the transaction being such as I have mentioned, the Plaintiff is only a trustee of these shares? Can there be any doubt that he is a trustee for the persons whose money bought and paid for them?—whether by their own hand or through an agent is perfectly indifferent. That is the real state of the case; and the question which arose in *Castellan* v. *Hobson* (1) has nothing whatever to do with this case, except that there the trusteeship was established, as appears by the judgment of Lord Justice (then Vice-Chancellor) *James*, and relief was accordingly given.

The facts of the case do not stop with the observation I have last made, because the transaction was so fully completed, as that when dividends came to be paid upon these shares—while dividends were payable—they were made in the regular course and paid, I do not say into Mr. *Dixon's* hands, but to Mr. *Dixon's* agent on his account. That is proved in the case. The passage from Mr. *Dixon's* answer which was read does not in the slightest degree call that in question, because what he says upon that is this—it is very ingenious and cautious no doubt—"I did not provide, in the first instance, any consideration money for any shares bought for me under my said instructions, but I have no reason to doubt that any consideration money payable in respect of such shares was debited by the said firm to my account, and paid or allowed by me in the adjustment of accounts between us." As to the receipt of dividends, the answer is not quite as distinct, although I can pay very little attention to an answer in which I find every sentence beginning with "Under the circumstances," evading the real question which is put to the Defendant, and not telling the story as one would expect a respectable man to tell his story, even if it were against his own interest. That the dividends were paid is proved in evidence; that calls were made and that calls were paid is proved in evidence. Everything substantial is proved in this case, and nobody can doubt that from the day upon which, in 1864, Mr. *Dixon's* agent (I mention his name only because his case, and his only, has been argued) bought and paid for these shares, Mr. *Dixon* was the true owner of these shares, as he is up to this moment.

Then it is said that there is great difficulty in this case because

(1) Law Rep. 10 Eq 47.

there has been no appropriation. Mr. *Dixon* has not had any shares appropriated to him, and the other Defendants have not had any shares appropriated to them. What does that signify? The mass remains. The entire number of shares is there. There is no question whatever about it. What does it signify to the Plaintiff in what proportions the Defendants are entitled, since it is proved that among them they, and they only, are the persons beneficially entitled to the shares? In my opinion the Plaintiff is entitled exactly to that relief which he prays for by his bill. He is entitled to a declaration that he is a trustee, and a trustee only, for the persons whose money bought and paid for these shares; he is entitled, notwithstanding the contrivance that was resorted to, to have "a release and discharge from all calls which, since the 14th of June, 1864, have been made or shall be made in respect of such shares, and to be indemnified against all future costs, damages, and expenses;" and he is entitled, in my judgment, also to have the costs of this suit up to the present time. When the Defendant says to the Plaintiff, "I cannot tell you which share is mine and which belongs to somebody else," that is matter of perfect indifference. The Plaintiff desires only to be indemnified in respect of fifteen shares, and since by the "contrivance"—I use the expression that I find in the prayer of the bill which I have just read—the Defendants are not able to say which shares are theirs, the Plaintiff is under no obligation to say which shares are theirs, nor in what proportions they are entitled to that number of shares—ninety I think in number—which now remain upon the books of the company.

Solicitors for the Plaintiff: Messrs. *Linklater, Hackwood, Addison, & Brown.*

Solicitors for the Defendant *Dixon:* Messrs. *Patteson & Cobbold.*

V.-C. B.
1873
March 8.

HIBBERT *v.* HIBBERT.

[1870 H. 2.]

Will—Construction—Relations.

Testator, after giving legacies to various persons, describing their relationship, including a person described as his niece, but in reality illegitimate, and persons connected by affinity, directed that if the whole of his property made more than the whole amounts mentioned in his will, it should be divided "amongst my relations in proportion to their separate amounts":—

Held, that only such of the legatees as were blood relations were entitled under the residuary gift.

JOSEPH STAFFORD, by his will, dated the 2nd of November, 1869, after giving to the children of his nephew *Robert Hibbert* certain specified legacies, gave "to my niece *Thirza Johnson*, wife of *Samuel Johnson*, or their heirs, the sum of £400. I also give and bequeath to my niece *Sarah Pearson*, wife of *George Pearson*, as she is not likely to leave any issue, £100. I also give and bequeath to my niece *Eliza Phillips*, wife of *William Phillips*, or their heirs, the sum of £400; to my niece *Joseph Stafford's* widow and two children *John* and *Joseph* the sum of £600; to *Rachel Simister*, wife of *William Simister*, daughter of my nephew *Daniel Bradbury*, he being deceased, or their heirs, the sum of £300; to *Betty Wood*, wife of *James Wood*, daughter of my nephew *Daniel Bradbury*, as aforesaid, or their heirs, the sum of £300; to *John Beard*, who married my niece *Mary Ann Hibbert*, but is dead without leaving any issue, the sum of £100." After some other bequests and directions, the will proceeded: "If the whole of my property makes more than the whole amounts mentioned in this my will, I request it to be divided amongst my relations in proportion to their separate amounts."

All the testator's next of kin were amongst the legatees named in the will.

With respect to the persons mentioned in the will, it appeared that testator had a sister *Anne Stafford*, who was married to *Joseph Hibbert*, by whom she had issue *Robert Hibbert*, *Mary Ann*, wife of *John Beard*, and *Sarah*, wife of *George Pearson*. In March, 1813, *Joseph Hibbert* was convicted at the *Derby* assizes of burg-

lary, and sentenced to be transported for life. In 1822, when *Joseph Hibbert* was alive, though not known by his wife to be so, *Anne Hibbert* went through the ceremony of marriage with *Joseph Mellor*. They had three children, *Caroline, Thirza*, wife of *Samuel Johnson* (described in the will as "my niece *Thirza Johnson*"), and *Eliza*, wife of *William Phillips* ("my niece *Eliza Phillips*, wife of *William Phillips*"). *Joseph Stafford*, son of a deceased brother of the testator, left a widow (described as "my niece *Joseph Stafford's* widow.") It also appeared that *Daniel Bradbury*, the father of *Rachel Simister* and *Betty Wood*, was an illegitimate son of *Rachel Bradbury*, a deceased sister of testator's wife.

The question now raised upon further consideration in a suit to administer the testator's estate was, who were entitled to take under the residuary gift: whether 1, those only amongst the legatees who were blood relations; or 2, all the persons described as relations without reference to legitimacy or blood relationship; or 3, only the next of kin.

Mr. *Kay*, Q.C., and Mr. *Finch*, for Plaintiffs *John* and *Joseph Hibbert*, sons of *Robert Hibbert*, and executors, contended that the gift of the residue to the testator's relations was confined to such as would take under the *Statute of Distributions*, and did not include the illegitimate children of relations, or persons not related in blood: *Thomas* v. *Hole* (1). The erroneous description of a person in one part of the will as a relation—here as "my niece"—would not enable such person to take as if she belonged to a class which was designated by the like description in another part of the same will: *Smith* v. *Lidiard* (2); *Thompson* v. *Robinson* (3); *In re Standley's Estate* (4).

Mr. *Little*, Q.C., and Mr. *Bardswell*, for *Robert Hibbert*, another son of testator's nephew *Robert Hibbert*, supported the argument of Plaintiffs, and contended that the gift was confined to relations in blood.

Mr. *J. W. Chitty*, for Mr. and Mrs. *Johnson*:—

Although in construing the residuary gift the word "relations"

(1) Cas. t. Tal. 251.
(2) 3 K. & J. 252.
(3) 27 Beav. 486.
(4) Law Rep. 5 Eq. 303.

5 Jur. N.S. 1196

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means *primâ facie* those only who are legitimate, this presumption is rebutted where the intention to use the word in a different sense clearly appears on the face of the will.

By describing in the previous part of the will both *Thirza Johnson* and *Sarah Pearson* by name as "my nieces" (or relations) this testator has clearly shewn his intention that they were to be included in the subsequent gift of the residue "amongst my relations," the rule being that a subsequent gift to relations, children or nephews or nieces, will be construed to mean the same persons as were described by that title in a previous part of the will: *Hartley* v. *Tribber* (1); *James* v. *Smith* (2); and on that principle the word "children" has been held, by force of the context, to carry the property to a class including both legitimate and illegitimate children: *Evans* v. *Davies* (3); *Meredith* v. *Farr* (4); *Owen* v. *Bryant* (5); *Worts* v. *Cubitt* (6); *Crook* v. *Hill* (7); in which case the strictness of the rule laid down in *Pratt* v. *Mathew* (8), that illegitimate children could not take under the same class gift with legitimate children, was disapproved of. The evidence in this case shews that the testator always treated *Thirza Johnson* and *Eliza Phillips* as his legitimate nieces, and that they were so regarded generally.

Mr. *Russell Roberts*, for the next of kin:—

In the absence of strong words plainly shewing a contrary intention, the word "relations" will be construed to mean next of kin according to the *Statute of Distributions*. This limitation of the term has been adopted to avoid the uncertainty and inconvenience that must otherwise arise from every person who could make any claim coming in: *Thomas* v. *Hole* (9); *Whithorne* v. *Harris* (10); *Green* v. *Howard* (11); *Rayner* v. *Mowbray* (12). It would be going out of the rule to construe "relations" as including illegitimate relations.

Mr. *Macnaghten*, for the heir-at-law.

(1) 16 Beav. 510.
(2) 14 Sim. 214.
(3) 7 Hare, 498.
(4) 2 Y. & C. Ch. 525.
(5) 2 D. M. & G. 697.
(6) 19 Beav. 421.
(7) Law Rep. 6 Ch. 311.
(8) 22 Beav. 328.
(9) Cas. t. Tal. 251.
(10) 2 Ves. Sen. 527.
(11) 1 Bro. C. C. 31.
(12) 3 Ibid. 234.

SIR JAMES BACON, V.C.:—

There is no rule in cases of this description except to construe the will so as to give effect to the intention of the testator as expressed by the words he has used. It is perfectly clear that the word "relations" standing by itself would mean next of kin; but the question is, what intention am I to ascribe to the testator on the words that he has used? Having a quantity of persons in his mind, the testator gives legacies to these persons, some of whom are his relations in the proper sense of the word, and some of whom are not. Then, by way of winding up his will, he gives this direction, "If the whole of my property makes more than the whole amounts mentioned in this my will, I request it to be divided amongst my relations in proportion to their separate amounts." The gift of the residue is to those persons who alone answer the description of his relations in the proper sense of the word. If it were necessary to refer to authorities, *Smith* v. *Lidiard* (1)—which shews that the circumstance that the testatrix had in her will given legacies to several persons, describing each as "my niece," did not enlarge the meaning of the words "nephews and nieces" in the residuary bequest so as to make it include two legatees whom she had called her nieces in the will, but who were in fact nieces not of the testatrix but of her late husband—is directly applicable to this case. It is not the province of the Court to speculate or consider what the testator would by strangers be supposed to have meant. No other meaning can be ascribed to the residuary gift than that the residue was to go to such of the legatees as were blood relations in the proportions of the legacies already given to them. As to *Thirza Johnson*, she must, on the evidence, be taken to be illegitimate, and will not share in the gift of residue.

Solicitors: Messrs. *Chester, Urquhart, & Co.*; Messrs. *Wilkins, Blyth, & Marsland.*

(1) 3 K. & J. 252.

V.-C. B.
1873
March 18, 19.

BIGG *v.* CORPORATION OF LONDON.

[1870 B. 113.]

Compensation—Public Body—Remote Injury.

A public body, with power by Act of Parliament to stop up, alter, or use, for the purpose of the authorized works, certain specified streets, were restrained by injunction from interfering, in excess of their powers, with the cellar of a house in one of the streets, the roadway of which was being lowered, until the amount of compensation for the whole house should have been ascertained and paid. An inquiry as to the damages sustained by Plaintiffs, the owner and occupier of the house, by reason of the works commenced by Defendants, having been directed by the decree:—

Held, that Plaintiff was not entitled to be compensated for the indirect injury to his trade, resulting from the diversion of traffic caused by the authorized act of lowering the roadway, but only for direct structural injury occasioned by the unauthorized interference with his cellar.

ADJOURNED summons on an application on the part of the Defendants that the Chief Clerk's certificate, dated the 6th of November, 1872, pursuant to the decree of the 23rd of January, 1872, should be varied by the omission of certain items of the schedule to such certificate.

Under the *Holborn Valley Improvement* (*Additional Works*) *Act*, 1867, which incorporated the provisions of the *City Improvement Act*, 1847 (regulating the mode of serving notice to treat, and assessing compensation for lands within the City taken otherwise than by agreement), and of the *Lands Clauses Act*, 1845, "except the provisions with respect to the purchase and taking of lands otherwise than by agreement," the Defendants were authorised to execute certain specified works, including "the stopping up and permanent appropriation, or the alteration, adoption, or use, for purposes of this Act, of all or any part of the streets, courts, ways, passages, alleys, squares, yards, and places" therein mentioned, including *Thavies Inn*; but no power was given to them to cut through or interfere with cellars under the roadways to be lowered or altered under the provisions of the Act, without serving notice to treat, and ascertaining the compensation for the houses to which such cellars belonged.

The Plaintiffs, *Bigg* and *Adkins*, were lessor and lessee of 4, *Thavies Inn*, where the business of a silversmith was carried on by *Adkins*.

In the course of their operations, Defendants, the Corporation, found it necessary to alter the level of part of *Thavies Inn* by lowering the foot and carriage way, for the purpose of making a proper junction with the *Holborn Viaduct*; and in carrying out this operation they had, without any notice to treat for Plaintiffs' house, or offer to assess compensation for it, excavated a large trench, five feet wide, along the roadway of *Thavies Inn*, extending throughout the whole length of Plaintiffs' cellars, which were left open and exposed, and, as the bill alleged, thereby endangering the stability of Plaintiffs' house.

On the 14th of April, 1870, the bill was filed for the purpose of restraining the Corporation from remaining in possession of the cellars of Plaintiffs' house (4, *Thavies Inn*), and from continuing to prosecute their works through the cellars or any other part of Plaintiffs' house, until the purchase-money or compensation to be paid by Defendants in respect thereof, should have been duly ascertained and paid. The bill also prayed that the Defendants might be ordered to reinstate Plaintiffs' cellars, and restore them to the state and condition in which they were previously to the commencement of Defendants' works, and to pay to Plaintiffs damages to be assessed by the Court for the injury sustained by them through those works.

At the hearing of the cause, on the 23rd of January, 1872, the Court being of opinion that the Corporation, in carrying out the works authorized by the Act of 1867, had exceeded their powers by cutting through Plaintiffs' cellar without taking their house, a decree was made for a perpetual injunction, until, &c., as prayed by the bill, with costs to be paid by Defendants, "and in case the parties differ as to the amount of damages to be paid to Plaintiffs by the Defendants," an inquiry—"what damages the Plaintiffs have sustained by reason of the works commenced by the Defendants as in the Plaintiffs' bill mentioned"—was ordered.

On the 1st of November, 1872, in pursuance of this inquiry, the Chief Clerk certified that £170 was the amount of the damages Plaintiffs had sustained by reason of the works com-

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menced by Defendants, the particulars of such damage being thus stated:—

"1. For loss sustained by reason of certain portions of the stock-in-trade of Plaintiff, *H. Adkins*, requiring re-silvering and cleaning, in consequence of the effluvium caused by Defendants' works, and by reason of the deprivation of the use of their cellars and the loss of some coals therefrom, £50.

"2. For bills paid by Plaintiff *H. Adkins* for the reconstruction of the cellars of the Plaintiffs' house, £70.

"3. For the sum necessary to be expended in order to place Plaintiffs' house in a proper habitable condition, £70.

"4. For depression of the trade carried on by the Plaintiff *H. Adkins* caused by the Defendants' works, £150."

In reference to the 4th item, evidence was given on behalf of the Plaintiffs before the Chief Clerk that the effect of Defendants' operations, by suspending all carriage traffic into and out of *Thavies Inn*, had been such as to depress the trade, and cause great inconvenience and obstruction to the various businesses there carried on; and in particular that *Adkins'* books shewed a loss of profit in his business of £300, and that former customers, finding a difficulty of access by reason of Defendants' works, had ceased to give him their orders.

Mr. *Kay*, Q.C., Mr. *Miller*, Q.C., and Mr. *A. T. Watson*, for the Defendants, in support of the summons to vary the certificate:—

The evidence does not shew with sufficient distinctness that any such damage as is alleged by Plaintiffs has been sustained. But in any case the allowance of such an item is contrary to the law, as laid down in *Ricket* v. *Metropolitan Railway Company* (1), that a mere temporary obstruction, occasioned by the performance of a public work authorized by Parliament, gives no right of compensation to the person whose trade has thereby sustained loss. In this case the Defendants had power under their Act to lower or alter the level of the roadway in *Thavies Inn*, so as to give access to the *Holborn Viaduct*, and in carrying out this work they

(1) Law Rep. 2 H. L. 175; 5 B. & S. 149.

exceeded their powers by cutting into Plaintiffs' cellar. The Plaintiffs filed their bill, complaining of structural damage but not of injury to their trade, and an injunction was granted to restrain Defendants from touching Plaintiffs' house in excess of their powers. For that structural damage the Plaintiffs have been declared entitled by the decree to compensation, but they are not therefore entitled to compensation for the interference with their business occasioned, not by the unlawful act of cutting through their cellar, but, indirectly, by the lawful act of lowering the roadway, which had the temporary effect of stopping carriage traffic. According to Plaintiffs' case, the injury to the business has been caused by the interference with the carriage traffic, and would have been the same if we had strictly confined ourselves to our Parliamentary powers, and stopped up *Thavies Inn* without touching their cellar; and even assuming that the injury was one for which compensation could have been obtained, it does not arise out of the wrongful act of the Corporation so as to give him a right against them. But in any case the injury on which the claim to compensation is founded is too remote to be the subject of an action; and unless the Plaintiff, independently of the *Railway Clauses Act*, and supposing it had never passed, could have maintained an action for the alleged interference with his business, he cannot since the passing of that Act—which gives no new right but only a new remedy—obtain statutory compensation: *Ricket* v. *Metropolitan Railway Company* (1); *Hammersmith Railway Company* v. *Brand* (2); *City of Glasgow Union Railway Company* v. *Hunter* (3). Even if there had been a wrongful obstruction of the highway of *Thavies Inn*, Plaintiffs would have had no ground of action for damage so remote as depression of their trade occasioned by interruption of carriage traffic; "and it seems unreasonable that an obstruction which created no cause of action either for the Plaintiff or for the travellers separately, should by indirect consequence become a cause of action to the Plaintiff because the travellers exercised their choice as to their path and as to their refreshment, a choice in which the Plaintiff had no manner of legal right": *Per Erle*, C.J., in *Ricket* v. *Metropolitan*

(1) Law Rep. 2 H. L. 175. (2) Law Rep. 4 H. L. 171.
(3) Law Rep. 2. H. L., Sc. 78.

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Railway Company (1). We submit, therefore, that the Chief Clerk has given the Plaintiffs damages to which they are not entitled, and this item of compensation for "depression of trade" must be struck out of the certificate.

Mr. *Amphlett*, Q.C., and Mr. *Phear*, for the Plaintiffs:—

If a person has, by the operations of a public body or company, sustained an injury which has caused a loss of his business, it is idle to contend that he is not entitled to compensation. We have established the fact of special injury, and an inquiry has been granted as to damages in respect of that special injury, which will include not only the structural damage, but the damage to our trade, which has been occasioned by the wrongful act of Defendants: *Wilkes* v. *Hungerford Market Company* (2) is a direct authority that a shopkeeper, who has suffered loss in his business in consequence of passengers having been diverted from coming to his shop by the works of a company, is entitled to recover; and again, in *Glover* v. *North Staffordshire Railway Company* (3), an interruption to a man's performance of his business has been held to give him a right to compensation in respect of his land being injuriously affected within the meaning of the *Lands Clauses Act;* and, as was said by Mr. Justice *Wightman* in that case, "Suppose no Act of Parliament had passed, and that had been done which has been done, would an action have been maintainable? I think it would.." Supposing a company, with power to block up the whole of a public street, had, instead of stopping the whole street, blocked up all access to one particular house, would not that be a special damage for which the owner of the house could recover? If, as in this case, they not only block up the access to the house, but cut a trench through the cellar in front of the house, the case for compensation is still stronger, and we submit that the Plaintiffs are entitled to recover, not only for the direct structural injury, but also for the injury to the business resulting from the works of the Defendants, which have been carried out in excess of their powers.

(1) 5 B. & S. 160, 161. (2) 2 Bing. N. C. 281.
(3) 16 Q. B. 912, 924.

Mr. *Kay*, in reply.

SIR JAMES BACON, V.C., after adverting to other points in the case not material for this report, continued:—

The decision in the House of Lords (*Ricket* v. *Metropolitan Railway Company* (1)) has gone far to settle the law in such cases; but to settle it as persons, who are not bound as we are, would not consider the most satisfactory mode, viz., that remote and consequential damages cannot be claimed. The case I have to deal with here is that of a corporation, who are entitled to lower the surface of the ground in *Thavies Inn*. That power is given to them by statute, and it cannot be questioned. In the course of doing it they inflict an injury and wrong upon the Plaintiffs, and for that they are required to make compensation, and the amount of compensation for that injury is assessed, and is not in dispute. But then it is said that besides that the Plaintiff *Adkins* is entitled to charge something for the loss which he may have sustained in his trade. Nothing can be more imaginary than the loss in the way it is stated. It is because customers of his could not have their usual access to his house that he says his trade has been depreciated. There is not, strictly speaking, a particle of evidence that his trade has been in any degree depreciated; and it is clear that the Plaintiff has no particular injury to complain of, as all the inhabitants of *Thavies Inn* would have as good a right to complain that their customers could not get access to their houses. That the level of the street was lawfully changed is beyond all possibility of dispute. That the compensation is made to the Plaintiff for all that he can claim in respect to direct injury is also not in dispute; and under these circumstances, as I find it totally impossible to sever that lawful lowering of the street from that other lowering of the street which took place when the Plaintiff's cellar was invaded, how can I say that the want of access to his premises has been occasioned by that which was wrongful, any more than that it was occasioned by that which was rightful? Looking at the position of the street as described in the evidence, there must of necessity, from

(1) Law Rep. 2 H. L. 175.

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the nature of the works, be an interruption to the traffic in *Thavies Inn*. If the Plaintiff could sever the damages which are properly attributable to the interference with his cellars from the damages occasioned by the interference with the access to his premises, there would be difficulty enough on the authorities. Upon the case, however, as it stands, and upon the evidence of the witnesses, bearing in mind the power which the Legislature has given to the Corporation to disturb, lower, or alter the level of the roadway in *Thavies Inn* (subject to their not doing such injury as they did to the Plaintiffs' cellar), I consider that there is no reason for damages being assessed for any such alteration of the roadway. Not one of the authorities referred to, in my opinion, justifies it. Having read very carefully the decision of Chief Justice *Erle* in *Ricket* v. *Metropolitan Railway Company* (1), I find no grounds upon which I can say that such injury as may have been sustained by the Plaintiff *Adkins*, on the score of his trade having been depreciated, justifies the claim which is here made for damages, or that which the Chief Clerk in his certificate has allowed. The certificate must, therefore, be varied by omitting the 4th item.

Solicitors: Messrs. *Prior, Bigg, Church, & Adams; The City Solicitor.*

(1) 5 B. & S. 160, 161.

In re DAVIDSON'S SETTLEMENT TRUSTS.

L. J. J.
for V.-C. W.
1873
Feb. 18.

Settlement—Fund in Court—Insolvency in Australia—Petition by Official Assignee at Brisbane—Domicil of Insolvent.

W. D., who had settled as a grazier in *Australia*, and had, upon his own petition, been adjudicated an insolvent, and received his certificate there, afterwards visited *England* in 1868, and died there intestate, leaving a widow in *Australia* and creditors who had received only a small dividend on their debts. Under a settlement made on the marriage of the father and mother of *W. D.*, the father, who died in 1869, had power to appoint a fund amongst his children, who, in default of appointment, were entitled equally. The power was not exercised. *W. D.'s* share of the fund had been paid into Court. On a petition by the official assignee in the insolvency, it was held that he was entitled to the fund in Court.

In re Blithman (1) discussed.

ON the marriage of the parents (English, and residing in *England*) of *Walter Davidson* a settlement was executed. The sum of £20,000 was vested in trustees upon trusts for the children of the marriage as the settlor should appoint, and in default of appointment, for the children equally. There were five children of the marriage, including *Walter Davidson*. He was born in *England*, and resided there until 1851, when he went to *Australia*, and settled at *Carabah*, in the colony of *Queensland*, as a grazier. In 1858 he visited *England*, and returned to *Australia* in 1860. In 1867 he again visited *England*, and died there on the 7th of July, 1868, intestate, without issue, but leaving a widow and his father him surviving. The father died in July, 1869, without having exercised the power of appointment over the fund which represented the £20,000 which he had settled. After the death of the settlor the trustees paid four-fifths of the fund to the brother and sisters of *Walter Davidson*, and his share they subsequently paid into Court under the provisions of the *Trustee Relief Act*.

On the 4th of December, 1866, *Walter Davidson* was, on his own petition, adjudicated, by the Supreme Court of the Colony of *Queensland*, an insolvent, and an official assignee was appointed.

(1) Law Rep. 2 Eq. 23; 12 Jur. N. S. 84; 35 Beav. 219

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Sittings under the insolvency were held on the 18th of December, 1866, and the 6th and 12th of February, 1867. Various creditors for small amounts proved their debts, and one creditor proved for £4894 17*s.* In consequence of the insolvent not having kept proper books of account, his certificate was in February, 1867, ordered to be suspended for twelve months.

On the 12th of March, 1868, an order was made by which the Supreme Court allowed the certificate.

The evidence shewed that the total amount of the debts was £5236 3*s.* 3*d.*, and that £205 17*s.* 8*d.* had been paid in dividends, leaving a balance of £5030 5*s.* 7*d.* still due to the creditors. The fund in Court, with dividends, was £4305 7*s.* 3*d.*

This was a Petition of *Alexander Raff*, of *Brisbane*, in the colony of *Queensland*, official assignee of and in the insolvent estate of *Walter Davidson*, late of *Carabah*, in the colony, grazier, deceased, claiming, under the 87th section of "An Act to amend and consolidate the Laws for the Relief of Insolvent Debtors" (*Queensland* Statutes, 28 Vict. No. 25, dated the 12th of September, 1864), that all the personal estate and effects, present or future, wheresoever the same might be found or known, and all property which he (the insolvent) might purchase, or which might revert, descend, or be bequeathed or come to him before he should have obtained his certificate, had become absolutely vested in him, as such official assignee, for the benefit of the creditors of the insolvent; and praying that the fund in Court (less the costs of himself and of all parties properly appearing as Respondents) might be paid to him.

No person had obtained a grant of letters of administration, but in the course of the hearing of the Petition the Lord Justice *James* appointed the widow of the insolvent to represent his estate.

Mr. *Dickinson*, Q.C., and Mr. *F. O. Haynes*, for the Petitioner, stated the facts, and after referring to the case of *In re Blithman* (1), submitted that he was entitled to the fund.

Mr. *Greene*, Q.C., and Mr. *Walter Phillimore*, for the widow,

(1) Law Rep. 2 Eq. 23. 12 Jur N.S. 64, 35 Beav

contended that this case was just like that of *In re Blithman* (1). The domicil of this insolvent was English; but there ought, if that was disputed, to be an inquiry; and also, whether the claim for £1894 17*s.* had been properly established under the insolvency.

They referred to *Re Stark* (2), *In re Garnier* (3), *Burge's* Foreign and Colonial Law (4), *Phillimore* on International Law (5), *Cook* v. *Sturgis* (6), *Ex parte Cook* (7), and *Jopp* v. *Wood* (8).

Mr. *Karslake*, Q.C., and Mr. *Rawlinson*, for the trustees.

Mr. *Kenyon Parker*, for a creditor, who now disclaimed.

Mr. *Dickinson*, in reply, submitted that the domicil of the insolvent was, upon the evidence, colonial at the time of his insolvency.

SIR W. M. JAMES, L.J.:—

I am of opinion, upon the facts in this case, that the Petitioner is entitled to the fund in Court, and it is not, in my view, necessary for me in determining that to consider what was the principle of the decision in *In re Blithman*. I have before me the trustees and the persons who have been appointed technically and formally to represent the estate, and I have to consider who has the best right to the fund. Whether the domicil of the insolvent was English or colonial, for the purposes of trading or otherwise, is immaterial. It seems to me that the proceedings under the insolvency in *Queensland* cannot be disputed by the representative of the insolvent, who became an insolvent upon his own petition, who voluntarily submitted himself to the Insolvency Court in the colony, and in whose lifetime debts were proved in the insolvency to a much larger amount than the sum in Court will provide for. It is clear that neither the insolvent's representative nor his next of kin can have any legal right to anything until after the payment of all his debts, and a surplus here is only in

(1) Law Rep. 2 Eq. 23.
(2) 2 Mac. & G. 174.
(3) Law Rep. 13 Eq. 532.
(4) Vol. iii. p. 906.
(5) Vol. iv. p. 547.
(6) 3 De G. & J. 506.
(7) 29 L. J. (Q.B.) 68.
(8) 34 Ibid. (Ch.) 212.

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the imagination. This case is totally different from *Cook* v. *Sturgis* (1), and the other cases which have been cited. It will be idle, on the facts before me, to direct further proceedings. The creditors who have proved are entitled to be paid, and the fund must be paid to the Petitioner for distribution amongst them. If there be any real ground for disputing the large debt already proved, it must be disputed in the insolvency in *Queensland*. I may add that it would be impossible to carry on the business of the world if Courts refused to act upon what had been done by other Courts of competent jurisdiction; and the proceedings in the Court at *Brisbane* conclusively shew that the insolvent was largely indebted beyond the amount of the sum in question. I must order the costs of all parties to be paid out of the fund, and the balance to be paid to the Petitioner.

Solicitors: Mr. *Child*; Messrs. *Walters, Young, Walters, & Deverell*.

L. J. J. for V.-C. W. 1873 *Feb.* 22.

In re GAITSKELL'S TRUST.

Will—Construction—Gift over—Lapse.

A testator gave to *A. B.* a legacy to be vested in him when and as he should attain the age of twenty-one years, or if he should die under that age leaving lawful issue at his death; and in case he should die without attaining a vested interest in his said legacy, the testator gave the legacy over to other persons. The legatee attained the age of twenty-one, and died in the testator's lifetime, leaving issue:—

Held, that the gift over took effect.

A TESTATOR directed his trustees and executors to set apart a fund to produce £300 a year for his widow during her life, and on her death the fund was to fall into the residue. He then directed that four sums of money should be set apart and be held upon trusts for his four daughters respectively during their respective lives, with remainders to their husbands and children, and he bequeathed three legacies to his three sons respectively: "the said several legacies hereinbefore bequeathed to my said sons to

(1) 3 De G. & J. 506. 5 Jur. N.S. 475.

be vested in them respectively when and as they shall respectively attain the age of twenty-one years, or if they should die under that age leaving lawful issue at their respective deaths; and in case any one or more of them shall die without attaining a vested interest or vested interests in his or their legacy or legacies, then I give and bequeath the said legacy or legacies of him or them so dying unto the others or other of my said sons." The testator bequeathed the residue to his seven children in equal shares, and directed that the share of each child should be held, applied, and disposed of upon the same or the like trusts and in the same or the like manner in all respects as were thereinbefore mentioned concerning his or her pecuniary legacy.

John Frederick, one of the sons, attained the age of twenty-one years, and died in the testator's lifetime, leaving a daughter. The testator thereupon, by a codicil, revoked the pecuniary legacy given to him, and gave a legacy of the same amount upon trusts for the grandchild, but did not make any disposition affecting the residue.

The testator died in 1836, leaving his widow (who died in 1872) and his other six children surviving. On the death of the widow the fund set apart for providing her annuity fell into the residue. The trustees paid into Court under the *Trustee Relief Act* the one-seventh share of such fund which *John Frederick* would have taken had he survived the testator.

This was a Petition presented by the surviving son, who claimed one half of the fund in his own right and the other half as the administrator of his eldest brother, who had attained twenty-one, survived the testator, and died.

Mr. *Dickinson*, Q.C., and Mr. *Cadman Jones*, for the Petitioner:—

It is submitted that the Court must, in construing this will, adhere to the words of it. *John Frederick* died without attaining a vested interest, and the question is, did the testator make a complete disposition of his property, or did he intend to die intestate as to a portion of it? The Respondents will probably contend that the will should be read as if the gift over had been "in case any of my sons shall die under twenty-one and without issue," in which case there would, no doubt, have been an intestacy; but it is

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submitted that he endeavoured to provide for every contingency, and further, that this case is governed by the decision in *Walker* v. *Main* (1). The object was not to die intestate as to this particular portion, but to provide for the circumstance of one son not getting that which was given to him, and in the event which has happened the two surviving sons became entitled to the fund: *Sykes* v. *Sykes* (2).

Mr. *W. W. Cooper*, for the representatives of the testator's widow.

Mr. *Jolliffe*, for the child of the son who died in the testator's lifetime:—

The testator, in using the words "upon the same or the like trusts and in the same and the like manner in all respects," intended to refer to the trusts declared of the daughters' legacies, and not the sons', for of those legacies no trusts were declared. There was no gift over of this particular fund, and the event which happened had had an effect upon the gift of residue in this way: *i. e.* the share of *John Frederick* having lapsed, there is an intestacy, and his daughter is entitled to a share as one of the next of kin.

Mr. *Russell Roberts*, for other next of kin, also submitted that there was an intestacy. He cited *Ryder* v. *Wager* (3).

Mr. *Ashmore*, for the surviving trustee of the will.

Mr. *Dickinson*, in reply.

Sir. W. M. James, L.J.:—

I cannot draw any substantial distinction between this case and that of *Walker* v. *Main*. The testator has not said that the legacy is to go over "if the legatee shall die under the age of twenty-one years without leaving issue," but if he "shall die without attaining a vested interest in his legacy." The legatee

(1) 1 Jac. & W. 1; in this case it appears from the recitals in the decree in the Registrar's Book, Reg. Lib. 1818, B. 2051, that *Mary Main* had attained the age of twenty-one.

(2) Law Rep. 3 Ch. 301.

(3) 2 P. Wms. 328.

John Frederick died without attaining a vested interest, and the precise event on which the legacy was given over has happened.

The question here relates only to that legatee's share of the residue, but it is impossible to say that the words of reference in the residuary gift do not import all the limitations to which the pecuniary legacies were subject in the same way as if the words had been repeated *totidem verbis*. Some argument in favour of the gift over taking effect may be drawn from the language of the codicil, but I do not rely on that. I prefer resting my decision on the broad ground that the event has happened upon which, according to the plain sense of the words of the will, the property was to go over; and even without the authority of the decision in *Walker* v. *Main*, I should have decided this case in the same way. The fund must be transferred to the Petitioner.

Solicitors: Messrs. *Grane & Son*; Messrs. *Valpy & Chaplin*; Messrs. *Rhodes & Son*; Messrs. *Cunliffe & Beaumont*.

SYNGE *v.* SYNGE.

[1872 S. 121.]

Will—Election.

A testatrix advanced £900 to *M.* on an assignment by him of a covenant by *F.* to transfer to *M.* £1000 stock, and to pay interest at £5 per cent. By her will she gave *F.* £3000 and all sums due to her by him, and directed her executors not to require payment of the £900 due from *M.*, but out of the £3000 given to *F.* to retain enough to purchase £1000 stock, in satisfaction of the covenant by *F.*, and to pay the surplus thereof beyond the £900 and interest to *M.* *F.* having predeceased her, she by a codicil directed the £3000 to form part of her residuary estate, but directed her executors not to call on *F.*'s representatives for payment or transfer of the £1000 stock, nor to enforce payment by *M.* of the £900:—

Held, that *M.* was not at liberty to enforce against *F.*'s estate the covenant to transfer the £1000 stock.

affd with slight variation by C. of A. 9 Ch. 128

THIS was a special case.

By an indenture, dated the 23rd of April, 1858, between *F. H. Synge*, of the first part, and *M. H. Synge*, of the other part,

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F. H. Synge, for considerations therein mentioned, covenanted with *M. H. Synge*, his heirs, executors, and administrators, that within twelve months after the death of Sir *J. M. Tylden* he would transfer £1000 £3 per Cent. Reduced Annuities into the name or names of the Defendant, his executors, administrators, or assigns, and would, in the meanwhile, pay interest half yearly, during Sir *J. M. Tylden's* life, equal to one moiety of the half-yearly dividends on £1000 £3 per Cent. Reduced Annuities, and after the death of Sir *J. M. Tylden*, a sum equal to the whole dividends.

By an indenture, dated the 8th of March, 1866, between the Defendant *M. H. Synge*, of the one part, and *Mary A. Synge*, of the other part, reciting the indenture of the 23rd of April, 1858, and that Sir *J. M. Tylden* was living, and *Mary A. Synge* had agreed to lend *M. H. Synge* £900, it was witnessed, that in pursuance of the said agreement, and in consideration of the said agreement, and of the sum of £900 paid by *Mary A. Synge* to the Defendant, he, the Defendant, did bargain, sell, assign, and transfer to *Mary A. Synge*, her executors, administrators, and assigns, all that indenture of the 23rd of April, 1858, and the principal and interest thereby secured, for the benefit of the Defendant, and all the right and interest of him, the Defendant, in and to the same, to have and to hold, receive and take, the said indenture, moneys, funds, and premises unto the said *Mary A. Synge*, her executors, administrators, and assigns, with power in the name of the Defendant to receive and demand the same, and to give discharges for the same: Provided that, if the Defendant, his heirs, executors, or administrators, should, on or before the 8th of September then next, pay the said *Mary A. Synge*, her executors, administrators, or assigns, the sum of £900, with interest thereon at £5 per cent., she, the said *Mary A. Synge*, would reassign. Then followed a covenant by the Defendant, in the usual form, to pay the principal and interest.

Sir *J. M. Tylden* died on the 8th of May, 1866, and after his death an arrangement was come to between *F. H. Synge* and *M. H. Synge* that the transfer of the £1000 £3 per Cent. Reduced Annuities should not be made forthwith, but that in the meanwhile *F. H. Synge* should pay interest at £5 per cent. on the market value

of the £1000 £3 per Cent. Reduced Annuities. The value was ascertained, and *F. H. Synge* paid to *M. H. Synge* interest on the value so ascertained until the 18th of May, 1871. *M. H. Synge* paid to *Mary A. Synge* interest till the 1st of July, 1871.

F. H. Synge died on the 17th of September, 1871, having, by his will, given all his real and personal estate to his widow, and appointed her executrix. She proved the will.

M. A. Synge died on the 6th of November, 1871. Among other legacies, by her will, dated the 8th of September, 1871, she bequeathed the following:—"To my late husband's nephew, *M. H. Synge*, thirty-six B shares in the *Weston-super-Mare Gas Company*. To my late husband's nephew, *F. H. Synge*, £3000, and all such sums of money, if any, as he may be indebted to me at the time of my death, except as hereinafter mentioned." The testatrix declared that in case any pecuniary legatee should die before her, his or her legacy should not lapse, but be paid to his or her personal representatives as part of his or her personal estate. The will proceeded as follows: "And whereas, by an indenture dated the 23rd April, 1858, *F. H. Synge* covenanted with his brother *M. H. Synge* to transfer into *M. H. Synge's* name, his executors, administrators, or assigns, £1000 £3 per Cent. Reduced Annuities at the end of twelve months after the death of Sir *J. M. Tylden*, and to pay him interest thereon in the meantime: And whereas, by an indenture dated 8th March, 1866, the Defendant, *M. H. Synge*, assigned the first mentioned indenture, and the moneys secured thereby, to me, by way of mortgage, for securing to me the said sum of £900 and interest, Now I do hereby will and direct that if at my death the said sum of £900 and its interest, so secured to me by the said indenture of the 8th March, 1866, or any part thereof, shall be still due to me, and if the aforesaid covenant, on the part of the said *F. H. Synge*, contained in the indenture of the 23rd April, 1858, shall be still unperformed, my executors shall not require payment of the said sum of £900 from the said *M. H. Synge*, but they shall retain out of the legacy of £3000 bequeathed by me to *F. H. Synge* so much as shall be sufficient to purchase, for the benefit of my estate, the said sum of £1000 Reduced £3, and the costs attending such purchase, and such purchase when made, shall be in satis-

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faction of the aforesaid covenant of *F. H. Synge*; and if the said £1000 stock shall be worth more than the said debt of £900 and the interest then due thereon, the surplus shall be paid to the said *M. H. Synge* by my executors." By a codicil, dated the 30th of October, 1871, she made the following disposition:—"Whereas, since the date of my will, *F. H. Synge* has died, Now I hereby declare that, notwithstanding anything contained in my will to the contrary, the legacies bequeathed to him shall not go to his representatives, but shall form part of my residuary estate, subject to payment of debts and other legacies: I will and direct that my executors shall not call upon the representatives of *F. H. Synge* for payment of any moneys, or for the transfer of any stock, pursuant to the deed of covenant of the 23rd April, 1858, nor enforce payment by *M. H. Synge* on security of deed of 8th March, 1866."

The market value of the £1000 £3 per Cent. Reduced at the date of the will was £915 12*s.* 6*d.*; at the date of codicil £911 13*s.* 4*d.*; at the date of testatrix's death £910 12*s.* 6*d.*

M. H. Synge claimed to take the benefit of the forgiveness of the debt of £900 and the share legacy, and to enforce the covenant against *F. H. Synge's* estate; but if put to election, he elected to take under the will. The Plaintiff was the executrix of *F. H. Synge*, and the Defendant was *M. H. Synge*, and the questions submitted were, whether *M. H. Synge* was entitled to enforce the covenant, and whether the Plaintiff was entitled to have the deed of covenant delivered up.

Mr. *Hemming*, for the Plaintiff:—

On the construction of the will and codicil taken together, the meaning is clear. If the £900 and the stock were exactly the same in value, there could hardly be a contest, and they were very nearly equal. The intention of the testatrix, in the event that took place after the death of *Francis*, was to benefit her husband's nephew, *M. H. Synge*, by relieving him of his debt to the testatrix, and to benefit the widow of *F. H. Synge*, by satisfying her husband's covenant. If that be not so, she conferred no benefit at all on *F. H. Synge's* estate. If it be said that after forgiving the debt the stock was not hers, then *M. H. Synge* is put to his

election. The natural construction must be followed, though it leads to election: *Wilkinson* v. *Dent* (1).

Mr. *Cookson*, for the Defendant:—

Wilkinson v. *Dent* has no application to this case, which is one of construction, not of election. The testatrix did originally, in her will, intend to benefit the representatives of *Francis*, but she altered her mind and withdrew her bounty. Had she intended to prevent *M. H. Synge* from enforcing his claim against *F. H. Synge's* estate, she might have done so, instead of which she simply says her executors are not to enforce it. Under these circumstances, there is nothing to prevent *M. H. Synge* from enforcing his security, though the testatrix's executors cannot do so.

SIR W. M. JAMES, L.J.:—

The will and codicil form one entire instrument, and reading them together, the obvious meaning is that the testatrix intended to provide for the debt due from *F. H. Synge* to *M. H. Synge* out of the legacy of £3000. When *F. H. Synge* died she, by her codicil, revoked the direction that his repesentatives should take the legacy, but she intended to continue her bounty to his representatives to the extent of the debt due on the security, and therefore she declared that her representative should not enforce the covenant to transfer the sum of £1000 Reduced Three Per Cents. This covenant had been assigned to her, and she was the person who had the right to deal with it, and she exercised that right by directing that the persons who had the paramount right to enforce it should not be at liberty to do so. *M. H. Synge*, who assigned this covenant to the testatrix, cannot enforce it either, and the questions must be answered accordingly.

Solicitor for *M. H. Synge*: Mr. *Mossop*.

Solicitor for the Representative of *F. H. Synge*: Mr. *Osborn Jenkyn*.

(1) Law Rep. 6 Ch. 339.

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1873
Feb. 28.

In re BANK OF HINDUSTAN, CHINA, AND JAPAN. *Ex parte* ALISON.

Void Amalgamation—Money paid for Void Shares returned—Interest—Summons a Demand in Writing within the 3 & 4 *Will.* 4, *c.* 32, *s.* 28.

Two banking companies, *A.* and *B.*, agreed to amalgamate, *A.* to be wound up and *B.* to continue and issue new shares at £6 premium, giving credit to the *A.* shareholders of £5 per share, representing the capital of *A.* handed over to *B.* A shareholder in *A.* was allotted twenty-five new shares in *B.*, and paid £150, and was credited with £125. The amalgamation having been declared *ultrà vires* and void:—

Held, that the shareholder was entitled to the return of £150 paid by him (but not to the £125 representing his interest in the capital of *A.* company), with interest at £5 per cent. from the date of the summons which claimed that interest.

THIS was a summons in the winding-up of the *Bank of Hindustan, China, and Japan, Limited*, by Mr. *Alison*, dated the 21st of April, 1871, for the return to the applicant of a sum of £275, of which £150 was money paid on an issue of new shares under an amalgamation between the *Imperial Bank of China, India, and Japan, Limited*, and the *Bank of Hindustan*, and the balance was money credited by the continuing bank in respect of shares held by the applicant in the old company. Prior to 1864, Mr. *Alison* held twenty-five shares in the *Imperial Bank of China and Japan*, on which he had paid £5 per share deposit and calls.

On the 28th of July, 1864, a circular was issued by the directors of the *Imperial Bank* to their shareholders, stating that negotiations had been concluded for an amalgamation with the *Bank of Hindustan;* and on the 10th of August, 1864, another circular was issued by the directors of the *Imperial Bank*, stating that an extraordinary general meeting of the shareholders in that bank would be held on the 25th instant at the *London Tavern*, when the agreement for an amalgamation would be submitted for approval, and resolutions to wind up the *Imperial Bank* voluntarily would be proposed. The terms of amalgamation were briefly as follows:—

20,000 new shares of £100 each of the *Bank of Hindustan* to

be issued at £6 per share premium. The meeting was held on the 25th of August, 1864, when it was resolved, among other things, that the agreement for amalgamation be adopted. The resolutions were confirmed at a subsequent extraordinary meeting held on the 12th of September, 1864. On the 1st of August the directors of the *Hindustan Bank* held a meeting of the board, at which the agreement for amalgamation was read and approved, and at an extraordinary general meeting on the 25th of August, 1864, that agreement was confirmed. A circular was then issued to the shareholders in the *Imperial Bank* to the effect that they were entitled to an equal number of shares in the new bank to that held by them in the *Imperial Bank* at £6 premium, by virtue of the directors of the *Imperial Bank* having paid to the *Hindustan Bank* a sum equal to £5 per share.

Mr. *Alison*, having agreed to come in on the 22nd of September, 1864, received notice that twenty-five shares were allotted to him, and on the 5th of January, 1865, he was credited with £5 per share on the shares held by him in the *Imperial Bank*, representing his interest in the *Imperial Bank*, and he then paid, in cash, £150 to the *Bank of Hindustan*, making together the sum of £275, which he now claimed.

Calls were subsequently made upon the shares which Mr. *Alison* held, and he having failed to pay them, the directors consequently, on the 12th of March, 1866, declared his shares forfeited, and commenced an action against him to recover previous calls due. On the 5th of May, 1866, some of the shareholders in the *Imperial Bank* filed a bill, by leave of the Court, to set aside the amalgamation as *ultrà vires*, which was heard on the 6th and 7th of May, 1868, by Vice-Chancellor *Giffard*, and the agreement declared to be *ultrà vires* and inoperative (1). The liability of the Defendant at law for the calls came on to be argued before the Court of Common Pleas, when the Court unanimously held that the Defendant *Alison* was entitled to the judgment of the Court. The Plaintiffs appealed to the Exchequer Chamber, but the judgment was affirmed (2).

By an order of the 21st of December, 1866, a voluntary winding-

(1) Law Rep. 6 C. P. 54.

(2) Law Rep. 6 C. P. 222.

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up of the *Bank of Hindustan* was ordered to be continued under supervision.

Mr. *Dickinson*, Q.C., and Mr. *Brooksbank*, for the applicant:—

The applicant is clearly entitled to a return of the money which he paid as the price of the shares. There were no such shares in existence, and therefore there was no consideration for the money paid.

[The Lord Justice James:—So far as you ask the return of the money actually paid, I am with you; but there is no ground for the return of the £125, which the applicant never paid, but with which, by a transaction that was void from beginning to end, he was to be credited. That is out of the question.]

Then we will not press that part of the case; but Mr. *Alison* is clearly entitled to interest. The statute 3 & 4 Will. 4, c. 32, s. 28, gives interest from the time when the demand shall be made in writing, so as such demand gives notice to the debtor that interest will be claimed. Independently of the statute, a person who pays a deposit, on failure of the vendor to make a title is entitled to interest: *Farquhar* v. *Farley* (1).

[They also referred to *Hughes' Claim* (2).]

Mr. *Greene*, Q.C., Mr. *Higgins*, Q.C., and Mr. *Waller*, for the liquidators of the *Hindustan Bank*:—

This is substantially an action at law for *restitutio in integrum*, which, under the circumstances of the case, viz., a common mistake without fraud, is unsustainable: *Western Bank of Scotland* v. *Addie* (3). It is contrary to the principles on which this Court acts to relieve one party against a common mistake at the expense of the other, more especially when it cannot restore both parties to their original position: *Era Case* (4); *Lawes* v. *Purser* (5). The moneys paid by *Alison* were paid by him voluntarily, and cannot be recovered back in the absence of *mala fides*: *Taylor* v. *Hare* (6). It is submitted, therefore, that this application must be refused.

(1) 7 Taunt. 592.
(2) Law Rep. 13 Eq. 623.
(3) Ibid. 1 H. L., Sc. 145.
(4) 2 J. & H. 409.
(5) 6 E. & B. 930.
(6) 1 B. & P. (N.R.) 260.

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SIR W. M. JAMES, L.J.:—

This is a very simple case, and but for the elaborate arguments at the Bar would have been a very short one.

The applicant seeks the return of money which he has paid as the price of certain shares which he did not get. There has been on both sides a common mistake of fact as well as of law, but without any fraudulent intention on the part of any one concerned. As it has turned out, there never were in existence any shares such as the company purported to allot to him. That being so, it seems a mere matter of course for him to say, "Give me back my money; I have received no shares." There is nothing in the circumstances of the case which can justify the *Bank of Hindustan* in refusing to repay to him the money he paid them under this common mistake.

It has been sought to impugn the soundness of the decisions of the Courts of Law; but I see no foundation for any such contention, and if I did, I consider I am bound, in a case of this kind, by the decision of the Exchequer Chamber.

It is perfectly plain that Mr. *Alison* has received nothing in consideration of the money he has paid, and therefore it ought to be repaid him. This disposes of the right as to the £150 actually paid. The claim to be repaid the £125 with which Mr. *Alison* was credited in respect of his shares in the *Imperial Bank* stands on a different footing, and cannot, in my opinion, be maintained. It formed part of one entire transaction, which was void from beginning to end. It is not money paid by him or on his behalf, and the very ground of his success in the former claim is fatal to success in this.

Possibly he may have some claim against his own company in its corporate capacity, who may have a claim over against the *Hindustan Bank*, but there is no foundation for any claim by Mr. *Alison* against the *Hindustan Bank*, except for the sum he has actually paid.

Then, with regard to the interest: I must hold that Mr. *Alison* is entitled to interest on the £150 from the 21st of April, 1871, that is, from the date of the summons. As no authority has been shewn to the contrary, I must hold that the summons is a demand in writing sufficient to meet the requirements of the statute.

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This application being in effect an action at law, interest must be computed at 5 per cent. The delay in this case has arisen from the procedure of the Court and not from the conduct of the parties.

Solicitor for *Alison*: Mr. *Pulbrook*.

Solicitors for the Liquidators: Messrs. *Ashurst, Morris, & Co.*

L. J. J. for V.-C. W. 1873 — *March* 6.

JOHNSON *v.* BURGESS.

[1869 J. 100.]

Administration Suit—Defendant ordered to pay Moneys into Court—Registration—Contempt—Sequestration of Real Estate—27 & 28 Vict. c. 112—Petition by Plaintiffs for Sale of Real Estate refused—Costs.

A Defendant in an administration suit failed to comply with an order (which had been registered) directing him to pay two sums of money into Court to the credit of the cause. Sequestrators, under a writ issued by the Plaintiffs, having entered into possession of the Defendant's real estate, a Petition was presented by the Plaintiffs, under the Act to amend the Law relating to future Judgments, Statutes, and Recognizances (27 & 28 Vict. c. 112), praying that such real estate might be sold and the proceeds applied in payment of the moneys due from the Defendant:—

Held, that the Plaintiffs were not creditors to whom the real estate of their debtor had been delivered in execution, and Petition dismissed accordingly.

THIS was a Petition by the Plaintiffs in the cause; and it was also intituled In the matter of the Act 27 & 28 Vict. c. 112 (an Act to amend the Law relating to future Judgments, Statutes, and Recognizances).

The suit was instituted against a trustee and executor for the administration of the trusts relating to the real and personal estate of the testator in the cause; and it was registered as a *lis pendens* on the 1st of July, 1870. On the further consideration, on the 25th of July, 1872, an order was made in the suit, whereby it was, *inter alia*, declared that the estate of the testator was interested in certain real estate in the proportion in the pleadings mentioned, and in a like proportion to a certain mortgage, and that the Defendant was bound to exonerate the real estate from two mortgages mentioned in the bill, and the interest; and the Defendant

was ordered to pay, on the 12th of December, 1872, into the bank to the credit of the cause the sum of £105 18*s.* 10*d.*, and the sum of £442 0*s.* 2*d.*, found due from him on account of the personal estate and of the rents and profits of the real and leasehold estate of the testator.

The order was registered in the Common Pleas on the 19th of December, 1872.

The Defendant did not pay the moneys into Court as directed.

On the 16th of January, 1873, a writ of sequestration was issued, directed to certain persons, two of whom were auctioneers, named, as against the Defendant's real and personal estate, for the purpose of obtaining payment of the moneys mentioned above. The writ was registered on the 31st of January in the Common Pleas, pursuant to the provisions of the statute 27 & 28 Vict. c. 112. The sequestrators took possession of certain personal estate valued at less than £250, and on the 18th of January they sequestered the real estate, and had entered into possession of such parts of it as were in the occupation of the Defendant, and the tenants of the other parts had attorned to them. No sums of money had been paid into Court. The Petitioners, the Plaintiffs, prayed that the real estate in the possession of the sequestrators might be sold, and that the proceeds of sale, or so much as might be applicable, might be applied in payment of the moneys due from the Defendant, and for consequential relief.

Mr. *Dickinson*, Q.C., and Mr. *Jemmett*, for the Petitioners:—

The Petition in *In re Rush* (1) was a similar one to this, and presented under the Act 27 & 28 Vict. c. 112, and there the Master of the Rolls made an order for sale of the estate sequestered. The order of this Court for payment of money into Court is, according to the decisions, the same as a judgment. The Plaintiffs obtained the order. It was for their benefit, and they issued the writ of sequestration. The sequestrators have not delivered the estate to the Plaintiffs themselves, but they still hold possession as they did in *In re Rush*. The Plaintiffs have registered the order, and also the writ of sequestration, and the sequestrators have taken possession for them of the real and personal estate; and it is sub-

(1) Law Rep. 10 Eq. 442.

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mitted that the Court can, upon their application, direct a sale of the real estate, and the money realized to be paid into Court, they being as much entitled to the real estate as to the personal, as they are both placed upon the same footing. If it should be said that the Plaintiffs are not creditors, the answer will be the Court is. The 4th section of the Act clearly entitles the Plaintiffs to an order for sale on this Petition.

[They cited *Gibbs* v. *Pike* (1) and 1 & 2 Vict. c. 110, s. 19.]

Mr. *J. W. Chitty*, for the Respondent:—

This Petition has been misconceived. It is intituled In the matter of the Act 27 & 28 Vict. c. 112, but the Plaintiffs can have no order for sale under that Act, and if not they can have no order for sale at all. The order in this case, for the payment of money into Court, and not to any person (1 & 2 Vict. c. 110, s. 18), had not the operation of a judgment, and the Court has no authority to order a sale unless under a judgment. This is an attempt to execute a judgment, and it must, it is submitted, fail. There are other persons interested besides the Plaintiffs.

[He referred to *Sutton* v. *Stone* (2); *Gibbs* v. *Pike* (3); *Shaw* v. *Wright* (4); *Ward* v. *Shakeshaft* (5); *Wand* v. *Docker* (6); *Daniell's* Ch. Practice (7); 1 & 2 Vict. c. 110, s, 18.]

Mr. *Dickinson*, in reply:—

The only case cited which I need refer to is that of *Ward* v. *Shakeshaft*. The expression made use of in the judgment in that case was in reference to a person who, although he got a decree against a Defendant, had nothing paid to him, but certain moneys were ordered to be paid into Court to the credit of the cause in which he was Plaintiff; "but that did not" (it was said) "constitute him a judgment creditor." The question in that case was, who of certain persons, who had disclaimed, were entitled to the costs. As to the word "person" in the statute 1 & 2 Vict. c. 110, it is submitted that an order for payment to the Accountant-General is sufficient—that he is a person within the meaning of the Act.

(1) 9 M. & W. 351.
(2) 1 Dick. 107.
(3) 8 M. & W. 223.
(4) 3 Ves. 22–24.
(5) 1 Dr. & Sm. 269–272.
(6) 5 Jur. (N.S.) 1287.
(7) 5th Ed. vol. i. p. 915.

There may be other persons interested in the moneys ordered to be paid in, and when the property has been sold and the proceeds paid into Court, they will have a right to receive that to which they may be entitled.

SIR W. M. JAMES, L.J. :—

I have only now to consider whether the prayer of this Petition ought to be granted. The Petitioners are the Plaintiffs in the suit, which was one for the administration of trusts affecting both real and personal estate of the testator in the cause. It is true that the Plaintiffs have a large personal interest in the sums of money which have been ordered to be paid into Court; but that cannot affect the true construction of the statute (27 & 28 Vict. c. 112). If this Petition can be sustained on the ground that the Plaintiffs are creditors to whom the lands of their debtor have been actually delivered in execution, then, as a matter of course, a Petition by any Plaintiff who has filed a bill for the administration of an estate, even though he might be interested in it in the very remotest degree, could be sustained. He might be, for instance, a simple contract creditor, and every farthing of the estate might go to a specialty creditor. But in fact the Plaintiffs are not, according to the plain meaning of the Act, creditors to whom the lands of their debtor were delivered in execution; nor are the sequestrators creditors; nor can the Court be considered a creditor to whom the Defendant must pay certain sums of money. The Defendant has not complied with the order which directed him to pay those sums of money into Court, and he is, in that respect, guilty of contempt of Court; still, I think it would be stretching the provisions of the statute beyond their plain meaning if I were to hold that the Plaintiffs are creditors to whom the lands of their debtor have been delivered in execution, and therefore I must dismiss this Petition; the costs of the Petitioners and the sequestrators must come out of the estate, and the Defendant must set off his costs against the debt due from him to the estate.

Solicitors: Mr. *G. C. Rice;* Mr. *A. D. Bird,* agent for Messrs. *Bellyse & Son, Nantwich.*

L. J. J.
for V.-C. W.
1873
March 12.

WATERER *v.* WATERER.

[1872 W. 11.]

Conversion—Partnership—Land "involved in Trade."

A testator, a nurseryman, devised his real estate, on part of which he had carried on his business, and his residuary personal estate, to his three sons, *F.*, *M.*, and *J.*, as tenants in common. After his death they carried on the business in partnership, and out of moneys belonging to the estate completed a contract for the purchase of more land which was inchoate at the death, and employed such land in the business. Subsequently, *F.* and *J.* purchased *M.*'s third share in the land and business, and paid for it partly out of the estate and partly out of moneys borrowed on the land. *F.* and *J.* then continued the business on the land. *F.* subsequently died intestate:—

Held, that both the devised and the purchased land employed in the business was converted.

JOHN WATERER was the owner of freehold land near *Bagshot*, on which he carried on the business of a nurseryman, under the name of *John Waterer & Sons*. He was assisted in his business by his three sons, *Frederick*, *Michael*, and *John*, to whom he paid certain sums for maintenance, but who were not otherwise interested in the business. He also possessed other real property. By his will, dated the 29th of August, 1867, he devised to his son *Frederick*, absolutely, a certain freehold house and land. The house and land in which he, the testator, then resided he gave to his son *Michael*, reserving for twenty-one years from his decease, for the benefit of those who might carry on his business, the use of a room on the ground floor for an office, without paying any rent for the same. After giving several pecuniary legacies, including £1000 to *Frederick* and £1000 to *Michael*, he devised and bequeathed all his real estate and the residue of his personal estate, including the goodwill of the business, unto his three sons, *Frederick*, *Michael*, and *John*, their heirs, executors, and administrators, as tenants in common, in equal shares, and he appointed his sons executors of his will. The testator died on the 2nd of November, 1868, and his will was proved by *Frederick* and *John*, but *Michael* subsequently renounced.

At his death there was subsisting a contract between him and one *Hodges* for the purchase, for the purpose of his business, of a house and farm at *Bagshot*, called the *New Farm*, for £3400. The contract was, after his death, carried into effect by his three sons, to whom the land was conveyed as tenants in common. For a short time the business was carried on by the three sons under the same style as before, but in April, 1869, it was arranged that *Michael* should retire, and as the residuary real and personal estate of the testator (except invested property) was employed in the business, it was arranged that *Frederick* and *John* should purchase *Michael's* interest under the will, except certain furniture, for £52,000, the purchase to be completed by the 1st of May, 1869. The purchase-money was subsequently increased to £52,500, to include profits from the testator's death, and was carried into effect on the 25th of March, 1870, when *Michael Waterer* granted, assigned, and confirmed unto *Frederick* and *John Waterer* all the dwelling-house devised by the testator to *Michael*, together with furniture and other things therein. And also all that one equal undivided third part or share of him *Michael Waterer* of and in the freehold lands, houses, and hereditaments belonging to the testator; and all that one undivided equal one-third part or share of him the said *Michael Waterer* in the residuary personal estate of the testator, including the goodwill of the said business, and all other claim or share, if any, of the said *Michael Waterer*, into or out of the real and personal estate of the testator, including the legacy of £1000, and in and to the rents, profits, and proceeds of the real and personal estate, except certain furniture removed from the house, to hold the same to the use of *Frederick* and *John Waterer*, their heirs, executors, administrators, and assigns, according to the nature and tenure thereof, in equal shares as tenants in common.

After completing the purchase from *Michael*, *Frederick* and *John* continued to carry on the business of nurserymen in partnership, under the old style of *John Waterer & Sons*, upon the same land, with the addition of the land purchased from *Hodges*. *Michael's* share of the estate was, in fact, purchased only in order to enable *Frederick* and *John* to carry on the business. The funds out of which the purchase was made were as follows:—£2000 out

L. J. J. for V.-C. W. 1873 WATERER v. WATERER.

of the assets, £8000 left due on the joint and several bond of *Frederick* and *John*, £27,000 paid out of moneys belonging to the testator's estate called in for that purpose, and £15,000 borrowed from the *London and County Bank* on the joint and several note of *Frederick* and *John Waterer*, secured also with other moneys on the deposit of the title deeds of the greater part of the real estate of the testator, including that purchased from *Hodges*. £6500 of the debt was paid off by *Frederick* and *John Waterer*, leaving only £11,500 due. The £8000 owing to *Michael* on the bond was also charged on the land subject to the charge of the bank, and was still owing.

On the 4th of October, 1871, *Frederick Waterer* died intestate, leaving his widow and ten children him surviving. His widow obtained letters of administration of his estate, and on the 11th of January, 1872, filed this bill. On the 4th of July, 1872, the Chief Clerk by his certificate found the facts above stated, and found that the said lands and hereditaments generally were, in fact, purchased and acquired for, and the same had been chiefly converted from time to time and used and occupied for or in connection with the business of a nurseryman; that such parts thereof as had not, at the death of the said intestate, been so converted, nor retained, nor used, were inserted in the schedule, parts 2 and 3, viz., four fields in pasture, let to one *Frimbley*, as yearly tenant, at a rent of £20; five houses to which the intestate was entitled, in equal moieties; and a field of one and a half acres unlet.

The certificate also found that the intestate had become answerable, or had expended £18,416 13*s*. 4*d*. in the purchase of *Michael's* third share under the will.

Mr. *Dickinson*, Q.C., and Mr. *Charles Browne*, for the Plaintiff, the widow.

Mr. *Greene*, Q.C., and Mr. *Cookson*, for the younger children of *Frederick*:—

It is shewn on the certificate that the land was used by the testator for the purpose of his trade, and that he devised it to his sons for the same purpose, else why did he reserve the room in the

house for an office? It is admitted that the sons employed the land devised, and acquired the additional land, for the purpose of carrying on the trade of nurserymen. In Mr. *Lindley's* valuable book (1) all the cases are collected, and the writer adds these observations: "From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts, it necessarily follows that in equity, a share in a partnership, whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate. And although the decisions upon this point are conflicting, the authorities which are in favour of the above conclusion, certainly preponderate over the others." Here the land was devised to the sons that it might be used as partnership property, and the new land acquired by the three co-partners solely for the same purpose, and both used as partnership assets. This distinguishes the case from those authorities which appear to conflict with the rule: such as *Thornton* v. *Dixon* (2); *Randall* v. *Randall* (3). On the other hand, the rule is supported by numerous authorities: *Ripley* v. *Waterworth* (4); *Townshend* v. *Devaynes* (5); *Phillips* v. *Phillips* (6); *Darby* v. *Darby* (7); *Essex* v. *Essex* (8); *Myers* v. *Perigal* (9); *Forbes* v. *Steven* (10). On these authorities, the decision ought to be that the land was personal estate.

Mr. *Lindley*, Q.C., and Mr. *Droop*, for the heir-at-law:—

There is, no doubt, some conflict in the authorities, which in one or two cases are irreconcilable; but except in those cases, the principle is clear. The trade of a nurseryman—which is not mentioned in the *Bankrupt Act*, though a market gardener is—bears more analogy to that of a farmer; but in *Morris* v. *Barrett* (11), where two devisees of land carried on the business of a farm and kept moneys in one common stock, and one died, it was held they

(1) 2nd Ed. vol. i. p. 667.
(2) 3 Bro. C. C. 199.
(3) 7 Sim. 271.
(4) 7 Ves. 425.
(5) Cited in Lindley on Partnership, 669, 2nd Ed.
(6) 1 My. & K. 649.
(7) 3 Drew. 495. 2 Jur. N.S. 271
(8) 20 Beav. 442.
(9) 2 D. M. & G. 599. 17 Jur. 145
(10) Law Rep. 10 Eq. 178.
(11) 3 Y. & J. 384.

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were joint tenants of the lands devised, but tenants in common of after-acquired lands. In *Brown* v. *Oakshot* (1), where the business carried on was that of a brewer, it was held that a devise to them both did not make them tenants in common. The only case where land acquired by devise was treated as partnership assets is *Essex* v. *Essex* (2), but that is quite inconsistent with *Cookson* v. *Cookson* (3). In *Steward* v. *Blakeway* (4), the Court held that shares in land purchased for a partnership business passed to the heir-at-law.

[They also referred to *Bissett* on Partnership (5), and *Myers* v. *Perigal* (6).]

SIR W. M. JAMES, L.J.:—

I am of opinion that this case is governed by that class of cases in which Lord *Eldon* said that where property became involved in partnership dealings it must be regarded as partnership property. It seems to me immaterial how it may have been acquired by the surviving partners, whether by descent or devise, if in fact it was substantially involved in the business. If, instead of *Michael* selling his undivided third part, there had been a partition beforehand, and then a purchase by the other partners of his allotment, it would have been impossible to say that the freehold so bought to carry on the business was not within the authorities. They buy it, not as an undivided third only, but in one lump, for one lump sum, including the goodwill; therefore it was, in fact, a purchase of land and business all together, by the continuing partners jointly, for the purpose of the business. Under those circumstances, I think they must be deemed to have irrevocably appropriated each of them his share in the land to the partnership purposes. A nursery gardener's business is probably one above all others where men would act as these gentlemen appear to have done. They necessarily appropriated the soil itself for gardening purposes which could not be carried on without it. It is, in fact, in nursery gardening, practically impossible to separate the use of the soil for the trees and shrubs, from the trees and shrubs

(1) 24 Beav. 254.
(2) 20 Beav. 442.
(3) 8 Sim. 529.
(4) Law Rep. 6 Eq. 479.
(5) Page 56.
(6) 2 D. M. & G. 599.

themselves, which are part of the freehold, and at the same time constitute the substantial stock-in-trade. In my judgment, therefore, the land used in the trade is part of the partnership property, and therefore personal estate. The house and land not used for the partnership business, but let to tenants, remain real estate. The mortgages must be paid exclusively out of personal estate.

L. J. J. for V.-C. W. 1873 WATERER v. WATERER.

Solicitor for the Plaintiff and younger children: Mr. *J. R. Adams.*

Solicitors for the Heir-at-law: Messrs. *Janson, Cobb, & Pearson.*

In re ANGLO-MORAVIAN HUNGARIAN JUNCTION RAILWAY COMPANY.

L. J. J. for V.-C. W. 1873 *March* 21.

DENT'S CASE.

Company—Subscriber of Memorandum—Article of Association—Allotment of Paid-up Shares—Agreement.

W. D., one of the seven persons who subscribed the memorandum of association of a company, to work a certain concession, agreed to take 100 shares. A recital of the articles of association was that *E.*, who assigned the concession to the company, had agreed to cause to be allotted to the persons subscribing the articles, shares to be deemed fully paid up, and the 5th article stated that the shares of each subscriber of the memorandum should be allotted to him as fully paid up, and that a competent number of shares should be allotted to *E.* in pursuance of the arrangement which had been previously come to. The company was registered on the 22nd of September, 1865, and on that day the directors issued to *E.*, for work already done, &c., &c., £50,000 in debentures and 4000 shares. *W. D.* was a director.

On the 3rd of October, 1865, *E.* requested the secretary to place shares of the 4000 in the names of the persons mentioned, *W. D.* being one of them, for 100 shares. The company was afterwards ordered to be wound up. The official liquidator placed the name of *W. D.* on the list of contributories in respect of the 100 shares for which he subscribed, and on summons asking that a call of £3 a share might be made:—

Held, that *W. D.*'s name had been rightly placed on the list, and that he must pay the call, and that it was not competent to persons who had bound

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themselves by the memorandum to take and pay for shares, to introduce an article into the articles of association to the effect that they should not be called upon to pay anything.

Pell's Case (1) observed upon.

Affirmed H.L. (1873) L.R. 8 C.L. 688.

THIS was an adjourned summons. The *Anglo-Moravian Hungarian Junction Railway Company, Limited*, was registered on the 22nd of September, 1865, under the *Companies Act*, 1862, and it was ordered to be wound up on the 22nd of April, 1870.

The memorandum of association stated that the object of the company was to construct and work a railway in *Moravia*, in accordance with a concession from the Emperor of *Austria*, and for the execution of other works; that the liability of the members was limited; that the capital of the company was £500,000 in 25,000 shares of £20 each; and that the seven persons whose names and addresses were subscribed were desirous of being formed into a company in pursuance of the memorandum of association, and that they had respectively agreed to take the number of shares in the capital of the company set opposite their respective names.

Wm. Dent was one of such seven persons, and he subscribed for 100 shares.

The concession had been granted to Mr. *Raikem* and Mr. *J. B. Even*, and one of the recitals of the articles of association was that *Even* (who was authorized to act as attorney for *Raikem* in the assignment of the concession) had agreed to cause to be allotted to certain of the persons subscribing the said articles shares in the company to be deemed fully paid-up shares; and the 5th article of association was as follows:—"The shares written in the memorandum of association opposite the name of each subscriber, shall be allotted to him as fully paid up, and a competent number of shares shall be allotted to *Even*," in pursuance of a written agreement which had been come to on the 19th of September, 1865. It was part of that agreement which was entered into by the parties who were to form the company, and *Even* (who was the contractor of the company), that in respect of certain works and labour already done, and goods and materials supplied, and contracts

(1) Law Rep. 5 Ch. 11.

entered into, and expenses incurred by him, there should be payable to him £50,000 in debentures and £80,000 in 4000 shares, and, accordingly, at the first meeting of the directors, held on the 22nd of September, 1865, it was ordered that such debentures and shares should be sealed and issued to *Even*: and that was thereupon done.

Every member holding not less than fifty shares was eligible as a director, provided all calls made on all his shares should have been paid.

Dent was a director, the first managing director, and chairman of the company.

The only claim established in the winding-up was for the sum (principal and interest) of £1997 9*s.* 7*d.*, by a transferee of seventy-nine of the debentures which had been issued to *Even*. It appeared that, on the 3rd of October, 1865, *Even* wrote to the secretary of the company, requesting him to make out shares in the names of gentlemen, nine in number, seven of whom were the original subscribers, for the numbers opposite their names, including 100 in the name of *Dent*, and he said he would inform the secretary how he wished the remaining shares should be prepared to complete the 4000. The official liquidator had settled six of the original subscribers, and *Even* and two other persons, on the list of contributories for, in the aggregate, 4000 shares, and this was a summons taken out by the liquidator, asking that a call of £3 a share might be made upon all the contributories.

Dent's evidence was, that it was part of the original agreement upon the formation of the company that his 100 shares should be fully paid up; that he signed the memorandum and articles of association upon the faith and in consideration of having the shares allotted to him as fully paid up; that no prospectus of the company was ever issued; that the company was never advertised to the public; that no shares were ever subscribed for by the public; and that the whole of the shares allotted were allotted as fully paid up.

Mr. *Dickinson*, Q.C. (Mr. *Cracknall* with him), for the official liquidator, after stating the facts, was stopped by the Court.

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1873

DENT'S CASE.

Mr. *Lindley*, Q.C., and Mr. *Marten*, for Mr. *Dent*:—

The *Companies Act*, 1867, has nothing to do with this case, this company having been formed in 1865. The first question is, ought not *Dent* to be treated as the holder of 100 fully paid up shares? and the 5th article is perfectly conclusive. The memorandum and articles were registered on the same day, and were part of one transaction, and must be construed together; and the decisions have gone to this length, that where the memorandum has been signed, as here, by *Dent*, if it appears from the articles that the shares were to be treated as fully paid-up, that is sufficient. The articles of association in this case embodied the agreement which had been previously entered into with *Even*, and which was to be carried out by him, and *Dent* shews by his evidence that the shares for which he subscribed were fully paid up; *i.e.*, they were a part of those shares which had been allotted to *Even*, and to which he was entitled, as part of the bargain between him and the company, as fully paid-up shares: *Pell's Case* (1); *Drummond's Case* (2); *Jones' Case* (3); *Companies Act*, 1862, ss. 11–14.

But if *Dent* should be retained upon the list, he ought not to be required to pay the call upon more than fifty shares. The real question, however, is, Can the Court strike out the 5th article of association, and hold that it has no application to this case? The agreement with *Even* was a *bonâ fide* one. It fully appeared in the articles of association; so that the creditors and others could not be misled. They knew that these shares were issued as fully paid up to *Even* for works already done by him, *Dent* having signed the articles upon the faith of having fully paid-up shares; he cannot be required to pay this call; and therefore the summons ought to be dismissed with costs.

SIR W. M. JAMES, L.J.:—

I am of opinion that Mr. *Dent's* name must remain on the list of contributories. It is not necessary for me to go at length into the

(1) Law Rep. 5 Ch. 11. (2) Law Rep. 4 Ch. 772.
(3) Law Rep. 6 Ch. 48.

cases which have been cited. I have more than once expressed a strong—I may say something more than a strong—inclination of my opinion, that *Pell's Case* (1) was originally rightly decided; but I am, of course, bound by the decision of the Court of Appeal, sitting here, as I do, as Vice-Chancellor, and should follow it if it governed this case; but it appears to me that the *ratio decidendi* does not extend to this case, and therefore I must act upon what I conceive to be the law applicable to it, which I think is a very simple one. Certain persons bound themselves by the memorandum of association to take shares and to pay for them, and the question is, whether it was competent to them to introduce an article into the articles of association, which in fact and in terms says that, notwithstanding those persons did undertake, by subscribing the memorandum and the articles of association, to take and pay for shares, they shall not be called upon to pay one farthing for them. It appears to me that the article is about as substantial an alteration of the memorandum as it is possible to conceive, such an alteration as is not permitted by sect. 12 of the *Companies Act*, 1862, and therefore I am of opinion that *Dent* is liable for the call. The order must be as asked. The costs of the liquidator must be costs in the winding-up, and *Dent* must pay his own costs.

Solicitors: Mr. *T. E. Watkin*; Messrs. *Thomas & Hollams.*

(1) Law Rep. 5 Ch. 11.

C. J. B.
1873
March 24.

Ex parte WALTER. *In re* HEATH.

Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 32—*Preferential Debts—Payment in full—Wages and Salaries—Composition.*

A schoolmaster filed a petition for liquidation, and his creditors resolved to accept a composition. Among the creditors were a music master and a drill sergeant, who were engaged by the term to attend the school twice a week, at a fixed payment per hour or per lesson, to give lessons to the pupils :—

Held, that the sums due to these creditors were not preferential debts within sect. 32, sub-sect. 2, of the *Bankruptcy Act*, 1869 :

Held, also, that sect. 32 has no application to the case of a composition.

HIS was an appeal from a decision of the Judge of the County Court at *Barnet.*

R. F. Heath, a schoolmaster at *Totteridge*, on the 26th of July, 1872, filed a petition for liquidation by arrangement or composition. The first meeting of the creditors was held on the 21st of August, and was continued by adjournment on the 30th of August. *Heath* produced a statement of his affairs, by which it appeared (*inter alia*) that he owed to "creditors for rent, rates, taxes, and wages, as per list E., £397 8*s.* 8*d.*" This list was read to the meeting, and it was stated that the creditors included in it were entitled to be paid in full. Among the creditors mentioned in list E. were, "*J. Brooks*, music master's salary, £26," and "*J. Hart*, drill sergeant's wages, £9." At the adjourned meeting on the 30th of August the creditors, by the statutory majority, resolved to accept a composition of 6*s.* in the pound on the amount of their debts, payable one calendar month after the registration of the confirming resolution, and *H. J. Walter* was appointed trustee. These resolutions were duly confirmed at another meeting of the creditors held on the 12th of September, and were duly registered. The trustee proceeded to get in the estate. He was afterwards advised that the debts of *Brooks* and *Hart* were not, under sect. 32, sub-sect. 2 of the *Bankruptcy Act*, 1869, preferential debts payable in full, and he declined to pay those creditors more than the composition of 6*s.* in the pound. *Brooks* and *Hart* applied to the Court for an order that the trustee should pay their debts in full.

Brooks deposed:—"I was engaged by *Heath* as a visiting master to instruct the pupils in music, and was paid by the term. I was to be paid 2*s.* 6*d.* per hour for the time I was occupied in teaching, and the time of going and returning. I attended twice a week during the whole term."

Hart deposed:—"I was engaged by *Heath* to instruct the pupils in drilling, and was paid by the term. I gave two lessons a week, and was paid 4*s.* each lesson, to cover going and returning. I taught twice a week during the term."

The Judge ordered the trustee to pay these two debts in full. The trustee appealed.

Mr. *Winslow*, for the trustee:—

The trustee is not bound by anything which took place at the meeting of the creditors which does not appear in the resolutions. It is his duty to investigate who are entitled to be paid in full. These creditors are not within sect. 32, sub-sect. 2 of the *Bankruptcy Act*, 1869 (1); they are clearly not labourers or workmen, and they are not clerks or servants in the employment of the debtor, for only part of their time was occupied for him: *Ex parte Crawfoot* (2); *Ex parte Grellier* (3); *Townshend* v *Windham* (4). The intention of the Act is that a clerk or servant who works for only one master should not, by reason of the master's bankruptcy, lose his sole means of subsistence.

Mr. *Harris*, for the claimants:—

The list E. of creditors who were to be paid in full was read to the meeting, and it was part of the basis of the resolutions afterwards passed; the trustee has no power to alter it. As to the

(1) Sect. 32 provides that the debts thereinafter mentioned shall be paid in priority to all other debts, and shall be paid in full, unless the property of the bankrupt is insufficient to meet them (that is to say),

(1.) Rates and taxes.

(2.) "All wages or salary of any clerk or servant in the employment of the bankrupt at the date of the order of adjudication, not exceeding four months' wages or salary, and not exceeding £50; all wages of any labourer or workman in the employment of the bankrupt at the date of the order of adjudication, and not exceeding two months' wages."

(2) Mont. 270.

(3) Ibid. 264.

(4) 2 Vern. 546.

C. J. B. 1873 *Ex parte* WALTER. *In re* HEATH.

construction of the section, the old cases are in our favour. The principle of this section, and of the analogous provisions in previous Acts, is, that persons who are engaged by time and not by the job are entitled to be paid preferentially: *Ex parte Homborg* (1); *Ex parte Neal* (2). That principle includes us.

SIR JAMES BACON, C.J.:—

I cannot affirm this order. The words of the section are very plain. Persons engaged as these claimants were do not come within the description of "any clerk or servant in the employment of the bankrupt." I should be setting aside the words of the statute if I were to hold that they do. Their attendance rather resembles that of a surgeon or apothecary. They were clearly neither clerks nor servants. Still less can it be said that they were paid wages, or that they were labourers or workmen. They could have, therefore, no preferential claim even in a bankruptcy. But this is a composition under sect. 126, and the essence of a composition is an equal benefit to all the creditors. Unless a composition is perfectly equal it is void. It is possible that the creditors might properly consent to pay out of their own moneys a larger amount to some particular creditors, but that would be a different matter. I do not find in the resolutions passed in this case anything different from an ordinary case of composition; there is no reference to any list of creditors who are to be paid in full, even if that would make any difference. The resolutions form the contract between the debtor and the creditors. The order of the County Court must be discharged.

Solicitor for the Trustee: Mr. *S. H. Head.*
Solicitor for the Claimants: Mr. *R. S. Harris, Hadley.*

(1) 2 M. D. & D. 642. (2) Mont. & M'A. 194.

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See GIFT BY IMPLICATION.

ACCEPTANCE OF SHARES—*Notice of Allotment—Posting Letter—Denial of receipt of Letter—Completion of Contract.*] An applicant for shares in a company denied that he had received the letter of allotment, which was posted in *London* on the 16th of March, and should have arrived on the 17th; and, having written on the 17th recalling his application, applied to have his name removed from the list of contributories:—*Held*, that the unsupported evidence of the applicant was not sufficient to prove that the letter of allotment which was posted had not been received, and that the name must therefore be retained upon the list.—The Court expressed an opinion that if the letter of allotment had not been received the contract to take shares would still have been binding upon the applicant as soon as the letter was posted.—*British and American Telegraph Company* v. *Colson* (Law Rep. 6 Ex. 108) disapproved of. *In re* IMPERIAL LAND COMPANY OF MARSEILLES. WALL'S CASE - - 18

2. —— *Qualified Acceptance—Conditional Application — Repudiation — Damages — Costs as between Solicitor and Client—Companies Act*, 1862, *s.* 35.] *A.* signed an application for shares in a company upon condition that he should be appointed secretary, and his acceptance of the office was to be subject to further inquiries, which he had caused to be made respecting the position of the company. The shares were allotted the next day, but *A.*, in consequence of information he received, declined the appointment, and required that the allotment should be cancelled. The company was wound up voluntarily, and *A.'s* name was placed on the list of contributories:—*Held*, that the application for shares was conditional, and the condition not having been fulfilled, *A.'s* name must be removed from the register and list of contributories, and as he had been placed there without any justification, he must receive costs as between solicitor and client by way of damages, under sect. 35 of the *Companies Act*, 1862, for the extra expenses incurred by him. *In re* NATIONAL EQUITABLE PROVIDENT SOCIETY. WOOD'S CASE - - - 236

ACCEPTANCE OF SHARES—*continued.*

ACCOUNTANT GENERAL—Transfer to Court of Chancery in *Ireland* - - 173
See TRANSFER OF FUND IN COURT.

ADJOINING COAL MINES—*Measure of Damages for Coals wrongfully taken — Mode of taking Account.*] Where coal has been wrongfully taken by working into the mine of an adjoining owner, the trespasser (in the absence of any suggestion of fraud) will be treated as the purchaser at the pit's mouth, and must pay the market value of the coal at the pit's mouth, less the actual disbursements (not including any profit or trade allowances) for severing and bringing it to bank, so as to place the owner in the same position as if he had himself severed and raised the coal. *In re* UNITED MERTHYR COLLIERIES COMPANY 46

ADMINISTRATION—Executor carrying on trade—Liability of estate - - - 134
See EXECUTOR CARRYING ON TRADE.

—— Intermeddling with—Plea that Defendant is not executor - - - 79
See EXECUTOR DE SON TORT.

—— Judgment against executor - - 270
See JUDGMENT CREDITOR.

—— Marshalling—Payment of debts - 175
See MARSHALLING.

ADMINISTRATION SUIT—Absconding Defendant—Payment into Court - - 200
See NE EXEAT REGNO.

—— Costs - - - - 16, 151
See COSTS IN ADMINISTRATION SUIT. 1, 2.

—— Sequestration—Judgment debt - 398
See SEQUESTRATION. 2.

ADMINISTRATOR—Judgment against—Priority
See JUDGMENT CREDITOR. [270

ADVANCEMENT — *Reservation of Interest by Donor—Rebuttal of Presumption—Purchase by a Father of Copyholds.*] A father purchased a copyhold cottage in the name of his son. Shortly after the purchase the father served notice to quit on an occupying tenant, but afterwards allowed her to remain at an increased rent, and during his life received the rents and paid the outgoings:—

ADVANCEMENT—*continued.*
Held (notwithstanding evidence of declarations that the cottage was the son's after his father's death), that the purchase was not an advancement. STOCK *v.* MCAVOY - - - 55

ADVERTISEMENTS—Settled Estates Act - 66
See SETTLED ESTATES ACT. 1.

AFFIDAVIT — Notarial seal — Certificate of British consul - - - 67
See NOTARY.

AGENT—Country solicitor—Costs - - 298
See COUNTRY SOLICITOR.

—— Patent—Discovery of name and address 115
See PATENT SUIT.

AGREEMENT—Marriage—Expression of intention to settle - - - 121
See MARRIAGE CONTRACT.

ALLOTMENT OF SHARES - - 18, 236
See ACCEPTANCE OF SHARES. 1, 2.

AMALGAMATION OF COMPANIES — *Limited with Unlimited Company—Form of Application for Shares—Allotment Letter—Alleged Conditional Contract—Acquiescence—Winding-up—Contributory.*] A shareholder in a limited company *A.*, which was being amalgamated with an unlimited company *B.*, received a printed form of application for shares in *B.* company, which he filled up with an application for ten shares, inserting, in writing, after the word "company," the words "if limited." The answer he received in May, 1869, was, that the directors of *B.* company had considered his application and had allotted him ten shares "in pursuance thereof," and had entered his name in the register. On the 1st of June, 1869, he wrote, "Send me certificate for my ten shares in exchange for this allotment letter." The certificates were sent. Nothing more was done until the 6th of November, 1869, when the company was ordered to be wound up. —In the form of application for shares, and in the allotment letter, the *A.* company was always properly described as "limited," and the *B.* company was properly described without that word. —The applicant, upon being settled on the list of contributories, sought to be relieved, on the ground that what he had contracted for were shares in a limited company:—*Held*, that the absence of the word "limited" was sufficient notice to the applicant (especially to a shareholder in a limited company) that the company for shares in which he was applying was unlimited; and that the insertion by him of the words "if limited" into the form of application was not effectual in imposing a condition upon the contract:—*Held*, further, that he had lost any right to relief against the company which he might otherwise have had, by delay and acquiescence. *In re* UNITED PORTS INSURANCE COMPANY. PERRETT'S CASE - - - - 250

2. —— *Void Amalgamation—Money Paid for Void Shares returned—Interest—Summons a Demand in Writing within the* 3 & 4 *Will.* 4, *c.* 42, *s.* 28.] Two banking companies, *A.* and *B.*, agreed to amalgamate, *A.* to be wound up and *B.* to continue and issue new shares at £6 premium, giving credit to the *A.* shareholders of £5 per share, representing the capital of *A.* handed over to *B.* A

AMALGAMATION OF COMPANIES—*continued.*
shareholder in *A.* was allotted twenty-five new shares in *B.*, and paid £150, and was credited with £125. The amalgamation having been declared *ultrà vires* and void:—*Held*, that the shareholder was entitled to the return of £150 paid by him (but not to the £125 representing his interest in the capital of *A.* company), with interest at £5 per cent. from the date of the summons which claimed that interest. *In re* BANK OF HINDUSTAN, CHINA, AND JAPAN. *Ex parte* ALISON - 394

ANSWER—Interrogatories by Defendant — Exceptions - - - - 302
See INTERROGATORIES BY DEFENDANT.

APPEAL—Bankruptcy - - - 291
See BANKRUPTCY APPEAL.

—— County Court - - - - 83
See COUNTY COURT APPEAL.

APPOINTMENT—Defective—Life interest, with power to appoint by will - - 307
See DEFECTIVE APPOINTMENT.

ARBITRATION—Building society—Jurisdiction [333, 344, n.
See BUILDING SOCIETY. 1, 2.

ARTICLES OF ASSOCIATION—Paid-up shares
See SUBSCRIBER OF MEMORANDUM. [407

ATTORNEY-GENERAL—Costs—Charges and expenses - - - - 294
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AUCTION—Order for sale by - - 150
See SALE IN CHAMBERS.

AVERMENTS—Plea of fraudulent preference 229
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AWARD—Payment by way of penalty - 36
See RELIEF AGAINST PENALTY.

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See BANKRUPTCY APPEAL.

—— Equitable charge on goods—Letter of hypothecation - - - - 69
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—— Fraudulent preference - - - 229
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—— Injunction - - - - - 75
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—— Irregular proceedings—Proceedings in the wrong Court - - - 221
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—— Mutual credit—Set-off - - 30, 93
See MUTUAL CREDIT. 1, 2.

—— Order and disposition - - 223
See ORDER AND DISPOSITION.

—— Preferential debts—Wages and salaries 412
See PREFERENTIAL DEBTS.

BANKRUPTCY APPEAL—*Amount of Deposit on Appeal—Application to increase—Appellant resident abroad—Bankruptcy Rules*, 1870, *r.* 145.] After an appeal has been entered with the Registrar, and the ordinary deposit of £20 has been made by the Appellant, it is too late for the Respondent to apply to have the amount of the deposit increased. *Ex parte* LOVERING. *In re* THORPE - - - - - 291

BANKRUPTCY JURISDICTION—*Bankruptcy Act*, 1869, *ss.* 6, 59, 65, 80, *sub-s.* 6, *s.* 82—*Bankruptcy Rules*, 1870, *rr.* 26, 36—*Irregularity—Proceedings commenced in wrong Court—Refusal to register Resolutions—Jurisdiction.*] A petition for liquidation was by mistake presented by a debtor to the wrong Court. A receiver was appointed, and all proceedings were carried on with perfect regularity till just before the second meeting of creditors, when the error was discovered. At the second meeting a resolution was passed transferring the proceedings to the proper Court. The Registrar refused to register the resolution, on the ground that the proceedings were a nullity. On appeal:—The Registrar was directed to register the resolutions, and the proceedings to be transferred to the proper Court. *In re* Buckland 221

BENEFIT BUILDING SOCIETY - 333, 344, n.
See Building Society. 1, 2.

BILL OF DISCOVERY—Identity of parcels 142
See Identity of Parcels.

BILL OF SALE—Letter of hypothecation—Registration - - - - 69
See Registration of Bill of Sale.

—— Registered after petition for liquidation 223
See Order and Disposition.

BLANKS IN WILL—*Number of Legatees—Incorrect Gift by a Testator.*] Bequest "unto each of my four nieces , the daughters of my deceased brother *Joseph*, the sum of £500." There were five daughters of *Joseph*, who all survived the testator:—*Held*, that the blank left in the will was not sufficient to distinguish this case so as to take it out of the settled rule, and that each of the five nieces was entitled to a legacy of £500. McKechnie *v.* Vaughan - - - 289

BUILDING—General line of—Church - 159
See General Line of Buildings.

BUILDING SOCIETY—*Reference of Disputes between the Society and their Members to Arbitration* —10 *Geo.* 4, *c.* 56, *ss.* 27, 29—6 & 7 *Will.* 4, *c.* 32, *s.* 4—*Demurrer—Pleading—Jurisdiction.*] It is contrary to the language of the statute, and against the policy of the law, that internal disputes between the members or office-holders of a building society and the society should be the subject of actions at law and suits in equity.—*Grimes* v. *Harrison* (26 Beav. 435) distinguished. *Smith* v. *Lloyd* (26 Beav. 507), and *Doubleday* v. *Hosking* (Law Rep. 15 Eq. 344, n.), not followed.—A bill, filed by a member of a building society against the society, their trustees and directors, stated that the rules were duly certified, and were, "so far as material," as followed. It then set out certain rules, numbered 12, 13, and 14; but no rule as to referring disputes to arbitration. It set out a letter containing an offer by the directors to refer all matters in dispute between the Plaintiff and them to arbitration "under the rules," and stated that the Defendants sometimes alleged that the dispute ought to be referred to arbitration, but that the Plaintiff charged that, having regard to the relief thereinafter prayed, he was not bound to refer the dispute to arbitration, and prayed, amongst other things, that it might be declared that the Plaintiff was entitled to the benefit of the 12th and 13th rules of the society. The Act requires that the rules of every building society shall contain a rule for referring disputes to arbitration. The Defendants demurred:—*Held*, that the Court was able to take judicial notice of the rule of the society for referring disputes to arbitration, though it was not set out in the bill.—Where a Plaintiff alleged misconduct against the directors of a building society in extending the business of the society to that of a bank of deposit, but did not state when the extension was made, and prayed no relief on the ground of the alleged misconduct, the Court, on demurrer, treated the allegation as immaterial.—A bill by a holder of shares in a building society against the society and their directors alleged misconduct against the directors in respect of acts which, for anything that appeared, might have been authorized by the rules of the society as stated by the bill; prayed that the Plaintiff was not bound by certain new rules that had been passed; and prayed the benefit of certain of the original rules; and for relief against the directors personally:—*Held*, that this was a dispute for the decision of which arbitrators were the proper authority; and demurrers by the society and by the directors allowed. Thompson *v.* Planet Benefit Building Society - 333

2. —— *Reference to Arbitration—Jurisdiction* —10 *Geo.* 4, *c.* 56, *ss.* 27, 29—6 & 7 *Will.* 4, *c.* 32, *s.* 4.] The Court of Chancery has jurisdiction to entertain a suit by a withdrawing member of a benefit building society for an account of payments due to him, notwithstanding the rule of the society for referring disputes between members to arbitration. Doubleday *v.* Hosking [344, n.

CASES—*Ashton* v. *Blackshaw* (Law Rep. 9 Eq. 510) considered - - - 223
See Order and Disposition.

—— *Attorney-General* v. *Campbell* (Law Rep. 5 H. L. 524) followed - - 1
See Succession Duty.

—— *Blithman, In re* (Law Rep. 2 Eq. 23) discussed - - - - 383
See Foreign Insolvency.

—— *Bradbury* v. *Morgan* (1 H. & C. 249) questioned - - - - 311
See Continuing Guarantee.

—— *British and American Telegraph Company* v. *Colson* (Law Rep. 6 Ex. 108) disapproved of - - - - - 18
See Acceptance of Shares. 1.

—— *Doubleday* v. *Hosking* (Law Rep. 15 Eq. 344, n.) not followed - - 333
See Building Society. 1.

—— *Forsbrook* v. *Forsbrook* (Law Rep. 3 Ch. 93) distinguished - - - 86
See Special Case.

—— *France* v. *France* (Law Rep. 13 Eq. 173) not followed - - - - 269
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—— *Grimes* v. *Harrison* (26 Beav. 435) distinguished - - - - 333
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—— *Homan, Ex parte* (Law Rep. 12 Eq. 598) considered - - - - 223
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—— *Jennings* v. *Rigby* (33 Beav. 198) followed
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—— *Key* v. *Key* (4 D. M. & G. 73) considered 86
See SPECIAL CASE.

—— *McCormick* v. *Grogan* (Law Rep. 4 H. L. 82) followed - - - - - 318
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—— *Peatfield* v. *Barlow* (Law Rep. 8 Eq. 81) followed - - - - 298
See COUNTRY SOLICITOR.

—— *Pell's Case* (Law Rep. 5 Ch. 11) considered
See SUBSCRIBER OF MEMORANDUM. [407

—— *Phipson* v. *Turner* (9 Sim. 227) followed
See DEFECTIVE APPOINTMENT. [307

—— *Rayner* v. *Koehler* (Law Rep. 14 Eq. 262) not followed - - - 79
See EXECUTOR DE SON TORT.

—— *Smith* v. *Lloyd* (26 Beav. 507) not followed
See BUILDING SOCIETY. 1. [333

—— *Stuart* v. *Cockerell* (Law Rep. 8 Eq. 607) followed - - - - 26
See MORTGAGE OF POLICY.

—— *Venner's Settled Estates, In re* (Law Rep. 6 Eq. 249) considered - - 284
See SETTLED ESTATES ACT. 2.

—— *Ware* v. *Rowland* (15 Sim. 587) considered
See "HEIRS." [110

—— *Webb's Policy, In re* (15 W. R. 529) not followed - - - - 26
See MORTGAGE OF POLICY.

—— *Young* v. *Young* (Law Rep. 13 Eq. 175, n.) not followed - - - - 269
See PARTITION SUIT.

CHANCERY FUNDS ACT, 1872—*Practice—Deposit of Securities in Court—Form of Order*—35 & 36 *Vict. c.* 44), *ss.* 3, 6, 10.] Form of order when securities of a miscellaneous character are brought into Court under the *Court of Chancery* (*Funds*) *Act*, 1872, ss. 3, 6, 10. POVAH *v.* WALKER. 316

CHARGE—Costs in administration suit—Trust estate - - - - 151
See COSTS IN ADMINISTRATION SUIT. 2.

CHARITY—Costs, charges, and expenses of Attorney-General - - - 294
See COSTS OF ATTORNEY-GENERAL.

CHURCH—Town Improvement Act—General line of building - - - - 159
See GENERAL LINE OF BUILDINGS.

CHURCH BUILDING ACTS—*Grant by Ecclesiastical Commissioners—Waste Lands—Customary Rights—Village Green*—51 *Geo.* 3, *c.* 115, *s.* 2—*Demurrer.*] The 2nd section of 51 Geo. 3, c. 115, does not enable grants overriding any customary rights other than rights of common and manorial rights of a like nature. The Ecclesiastical Commissioners, as lords of the manor of *B.*, in the parish of *M.*, granted to the Vicar of *M.*, under the 51 Geo. 3, c. 115, s. 2, part of the waste of the manor for a burial ground. To a bill filed on behalf of the parishioners setting up a customary right to this part of the waste as a village green, and seeking to set aside the grant, a demurrer was overruled. FORBES *v.* ECCLESIASTICAL COMMISSIONERS FOR ENGLAND 51

CLASS—Relations - - - 148, 372
See "RELATIONS." 1, 2.

CLERGY—Relinquishment of office—Vacating inrolment - - - - 154
See CLERICAL DISABILITIES ACT.

CLERICAL DISABILITIES ACT—33 & 34 *Vict. c.* 91—*Deed of Relinquishment by Clergyman—Inrolment—Change of Intention—Vacating Inrolment.*] A clergyman, with the view of relinquishing his office, executed a deed in the form prescribed by the statute, 33 & 34 Vict. c. 91, and caused it to be inrolled, but did not take any of the further steps required by the Act. He subsequently abandoned the intention of relinquishing his office:—*Held*, that the inrolment might be vacated. *Ex parte* A CLERGYMAN - 154

COAL MINES—Wrongful working—Mode of taking accounts - - - 46
See ADJOINING COAL MINES.

COLONIAL LAW—Forfeiture for felony—Conviction in *New South Wales* - - 355
See FORFEITURE FOR FELONY.

—— Insolvency in *Australia* - - 383
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COMPANY—Acceptance of shares—Allotment of shares - - - 18, 236
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—— Amalgamation - - - 250, 394
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—— Subscriber of memorandum - - 407
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—— Surety for—Interest - - - 43
See INTEREST ON PAYMENT BY SURETY.

—— Transfer of shares—Infant - - 363
See INFANT TRANSFEREE.

—— Winding-up—Petition - - - 274
See WINDING-UP PETITION.

COMPENSATION UNDER LANDS CLAUSES ACT—*Public Body—Remote Injury—Loss of Trade.*] A public body, with power by Act of Parliament to stop up, alter, or use, for the purpose of the authorized works, certain specified streets, were restrained by injunction from interfering, in excess of their powers, with the cellar of a house in one of the streets, the roadway of which was being lowered, until the amount of compensation for the whole house should have been ascertained and paid. An inquiry as to the damages sustained by Plaintiffs, the owner and occupier of the house, by reason of the works commenced by Defendants, having been directed by the decree:—*Held*, that Plaintiff was not entitled to be compensated for the indirect injury to his trade resulting from the diversion of traffic caused by the authorized act of lowering the roadway, but only for direct structural injury occasioned by the unauthorized interference with his cellar. BIGG *v.* CORPORATION OF LONDON - - - 376

COMPOSITION BY ARRANGEMENT—Payment of wages and salaries - - 412
See PREFERENTIAL DEBTS.

COMPOSITION DEED—Recital of inability to pay debts—Forfeiture clause - - 314
See Forfeiture Clause.

COMPULSORY POWERS—Railway company—Infant—Constructive trust - 78
See Trustee Act.

CONDITION—Application for shares - 236
See Acceptance of Shares. 2.

—— Application for shares - - - 250
See Amalgamation of Companies. 1.

CONSIDERATION—Marriage—Expression of intention to settle - - - 121
See Marriage Contract.

CONTEMPT, PROCESS OF—*Practice—Rescinding Contract after Decree for Specific Performance—Absconding Defendant.*] After a decree for specific performance of a contract to take a lease of a house, and an order on further consideration for payment of the sums certified to be due from him for costs and damages, Defendant having absconded without paying the amount, the Court, on motion by Plaintiff, ordered the contract to be rescinded, and all further proceedings in the suit stayed, except as to the recovery of the sum already ordered to be paid. Watson *v.* Cox. 219

—— Sequestration - - - 266, 398
See Sequestration. 1, 2.

CONTINUING GUARANTEE—*Principal and Surety—Guarantee determinable by Notice—Death of Guarantor—Notice of Death—Determination of Guarantee.*] A guarantee to continue in force until six months after notice in writing under the hand of the guarantor of his intention to discontinue the same:—*Held*, to be determined by notice of the death of the guarantor. *Bradbury* v. *Morgan* (1 H. & C. 249) questioned. Harriss *v.* Fawcett - - - - - 311

CONTRACT—Marriage—Expression of intention to settle - - - - 121
See Marriage Contract.

CONTRIBUTORY—Acceptance of shares—Allotment of shares - - 18, 236
See Acceptance of Shares. 1, 2.

—— Consent order to rectify register - 274
See Winding-up Petition.

—— Subscriber of memorandum - - 407
See Subscriber of Memorandum.

CONVERSION—*Partnership—Land "involved in Trade."*] A testator, a nurseryman, devised his real estate, on part of which he had carried on his business, and his residuary personal estate, to his three sons, *F.*, *M.*, and *J.*, as tenants in common. After his death they carried on the business in partnership, and out of moneys belonging to the estate completed a contract for the purchase of more land, which was inchoate at the death, and employed such land in the business. Subsequently, *F.* and *J.* purchased *M.*'s third share in the land and business, and paid for it partly out of the estate and partly out of moneys borrowed on the land. *F.* and *J.* then continued the business on the land. *F.* subsequently died intestate:—*Held*, that both the devised and the purchased land employed in the business were converted. Waterer *v.* Waterer - - 402

COPYHOLDS—Purchase by father for child 55
See Advancement.

COPYRIGHT—*Engraving—Name of Proprietor—Trading Name of Firm—8 Geo. 2, c. 13. s. 1.*] Where prints, engravings, and similar articles are the property of a trading firm, the proprietorship is sufficiently designated for the purpose of obtaining the protection of the Copyright Acts, by printing upon them the trading name of the firm, even though it does not contain the names of all the partners in the business. Rock *v.* Lazarus [104

CORPORATION—Limit of powers—Injury to individuals - - - - 167
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—— Appeal from County Court—Successful Appellant - - - - 245
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—— Attorney-General's charges and expenses 294
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—— Between solicitor and client - - 236
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—— Country solicitor's lien—*London* agent 298
See Country Solicitor.

—— Partition suit - - - - 269
See Partition Suit.

—— Trustees Relief Act - - - 194
See Trustees Relief Act.

COSTS IN ADMINISTRATION SUIT—*Administration—Sale—Priority of Costs.*] In an administration suit by a mortgagee who has obtained an order for sale of the real and leasehold estate for payment of his debt, the personal representatives of the testator are entitled, in case of deficiency of assets, to their own costs, charges, and expenses, in priority to the Plaintiff's costs of the sale. *In re* Spensley's Estate. Spensley *v.* Harrison 16

2. —— *Practice—Charge of Costs on Trust Estate—Submission to pay Costs.*] The Court has no jurisdiction to charge the costs of an administration suit on any part of the estate administered, and direct a sale against the will of a person beneficially entitled, who submits to pay his share of the costs. Lees *v.* Lees - - - 151

COSTS OF APPEAL—*Practice—County Court Appeal—Successful Appellant.*] On an appeal from a County Court the Court has jurisdiction to allow a successful Appellant the costs of the appeal as well as those of the suit in the Court, and as a general rule will do so. Ashby *v.* Sedgwick 245

COSTS OF ATTORNEY-GENERAL—*Practice—Charity—Charges and Expenses.*] When the Attorney-General, upon making an application to the Court of Chancery in the matter of a charity, desires an order for taxation and payment of his costs, charges, and expenses, relating to the charity, not being costs in the matter, the summons shall contain a statement of the matters in respect of which payment of such costs is desired. *In re* Dulwich College - - - 294

COUNTY COURT APPEAL—*Limit of Time—Waiver—Consent to Signature of Case.*] Parties to an appeal from a County Court may waive the limit of thirty days from the determination or

COUNTY COURT APPEAL—*continued.*
direction intended to be appealed from, prescribed by sect. 18 of the *County Courts Equitable Jurisdiction Act*, 1865, and their consent to the signature of the case for appeal by the County Court Judge is sufficient evidence of such waiver. Ward *v.* Raw - - - - - 83

—— Costs of successful Appellant - - 245
See Costs of Appeal.

COUNTRY SOLICITOR—*London Agent—Lien.*] At the request of the client of a country solicitor, *R.* paid to the solicitor a sum of £350 in part discharge of costs due to the solicitor in respect of administration suits to which the client was Defendant, and the repayment was secured by a mortgage on the solicitor's lien. Afterwards the costs were ordered to be taxed, and paid out of a fund in Court to the town agents of the solicitor:—*Held*, upon the Petition of the client, that the costs so ordered to be paid to the agent must be paid to *R.* in satisfaction of his claim under the mortgage.—*Peatfield* v. *Barlow* (Law Rep. 8 Eq. 61) followed. Cockayne *v.* Harrison - 298

COVENANT—Restraint of trade - - 59
See Restraint of Trade.

CREDITOR—Sale by Court—Opening buildings
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CREDITOR'S DEED—Recital of inability to pay debts—Forfeiture clause - - 314
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—— Measure of—Wrongful working of coal mine
See Adjoining Coal Mines. [46

—— Payment by way of penalty - - 36
See Relief against Penalty.

DEATH BEFORE TESTATOR—*Will—Construction—Gift over—Lapse.*] A testator gave to *A. B.* a legacy to be vested in him when and as he should attain the age of twenty-one years, or if he should die under that age leaving lawful issue at his death; and in case he should die without attaining a vested interest in his said legacy, the testator gave the legacy over to other persons. The legatee attained the age of twenty-one, and died in the testator's lifetime, leaving issue:—*Held*, that the gift over took effect. *In re* Gaitskell's Trust - - - - - 386

DECLARATION OF FUTURE RIGHTS - 86
See Special Case.

DECREE—Execution of—Sequestration - 266
See Sequestration. 1.

DEED—Mistake in—Rectification - - 247
See Mistake in Deed.

DEFECTIVE APPOINTMENT—*Will—Power to appoint to Children—Gift to Child of Life Interest with Power to appoint by Will.*] A testator gave certain property upon trust for his granddaughter *A.* for life, and after her death for her children, or some of them, as she should by deed or will appoint. *A.*, by her will, appointed one-fifth of the fund to each of five children (all of whom were living at the death of the original testator) for life, and after the death of each child, directed that the share in which the child had a life interest should be held in such manner as the child might by will appoint, with limitations over in default of appointment, in favour of the children of the said five children and of the survivors in different events:—*Held*, a good exercise of the power of appointment given by the will of the testator—*Phipson* v. *Turner* (9 Sim. 227) followed. Slark *v.* Dakyns - - - - - 307

DELAY—Contributory - - - 250
See Amalgamation of Companies. 1.

—— Corporation—Town improvement—Building beyond general line - - 159
See General Line of Buildings.

DEMAND IN WRITING—3 & 4 Will. 4, c. 42, s. 28—Summons - - - 394
See Amalgamation of Companies. 2.

DEPOSIT—Appeal in bankruptcy—Appellant abroad - - - - 291
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—— In Court—Securities - - - 316
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—— Railway company - - - 108
See Deposit by Railway Company.

DEPOSIT BY RAILWAY COMPANY—*Payment out of Court—Railways Construction Act*, 1864—27 & 28 *Vict. c.* 121—*Casus omissus.*] The promoters of a railway company paid their deposit into Court under the *Railways Construction Act*, 1864, upon obtaining the usual certificate of the Board of Trade. The bill had passed through the House of Commons, and had passed the first reading in the House of Lords; but no further progress could be made, in consequence of the rules of the House requiring certain stages to be passed at an earlier period of the session:—*Held*, upon petition for payment of the deposit out of Court, that although this case was omitted from the *Railways Construction Act*, the Court had power to make the order. *In re* Widnes Railway Company - - - - - 108

DEVISE—For payment of debts - - 175
See Marshalling.

DISCOVERY—Bill for—Identity of parcels 142
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—— Interrogatories by Defendant - - 302
See Interrogatories by Defendant.

—— Patent suit—Names of purchasers and agents
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DOMICIL—Foreign—Succession Duty - 1
See Succession Duty.

—— Insolvency in *Australia* - - 383
See Foreign Insolvency.

ECCLESIASTICAL COMMISSIONERS—Grant of waste of manor - - - 51
See Church Building Acts.

ELECTION—*Will—Direction to Legatee not to enforce a Debt.*] A testatrix advanced £900 to *M.* on an assignment by him of a covenant by *F.* to transfer to *M.* £1000 stock, and to pay interest at £5 per cent. By her will she gave *F.* £3000 and all sums due to her by him, and directed her executors not to require payment of the £900 due from *M.*, but out of the £3000 given to *F.* to retain enough to purchase £1000 stock, in satisfaction of the covenant by *F.*, and to pay the surplus thereof beyond the £900 and interest to *M.* *F.* having predeceased her, she by a codicil directed the £3000 to form part of her residuary estate, but directed her executors not to call on *F.'s* representatives for payment or transfer of the £1000 stock, nor to enforce payment by *M.* of the £900;—*Held*, that *M.* was not at liberty to enforce against *F.'s* estate the covenant to transfer the £1000 stock. Synge *v.* Synge - - 389

EQUITABLE ASSIGNMENT—Letter of hypothecation - - - - 69
See Registration of Bill of Sale.

ESTATE TAIL—Protector of settlement—Survivorship - - - - 178
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EVIDENCE—Examination taken abroad—Notice - - - - - 213
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—— Parol—Declaration of trust - - 318
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EXAMINATION—Notice - - 102, 213
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EXECUTOR—Carrying on trade—Liability of estate - - - - 134
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—— *De son tort*—Plea that Defendant not executor - - - - 79
See Executor de son Tort.

—— Judgment against—Priority - - 270
See Judgment Creditor.

EXECUTOR CARRYING ON TRADE—*Administration—Liability of Testator's Estate—Remedy of Creditor.*] A testator having directed his executors, at their discretion, either to wind up or to continue his business (that of a clothier), with power to apply the capital employed in the business in carrying it on, and to employ in such business any money, part of his general estate, the executors elected to continue the business, but did not, as they said (and the contrary was not proved), employ more of the assets in carrying on the business than were so employed at the testator's death.—Upon bill by a person alleging himself to be a creditor of the business since the death, on behalf of himself and all the other creditors of the testator, seeking administration of the testator's estate which had been employed in the business, there being no suggestion of insolvency:—*Held*, that the remedy of the Plaintiff was not an administration decree in this Court, but an action at law. Owen *v.* Delamere - - - - - - 134

EXECUTOR DE SON TORT—*Administration—Plea that Defendant is not Executor.*] To a bill alleging that the Defendant is executor of a testator, and had, before probate, possessed himself of part of the personal estate, and praying for general administration, a plea that the Defendant is not executor is a complete answer.—*Rayner* v. *Koehler* (Law Rep. 14 Eq. 262) not followed. Cary *v.* Hills - - - - 79

FACTOR—Pledge by—Registration - 69
See Registration of Bill of Sale.

FELONY—Forfeiture—Defeasible interest 355
See Forfeiture for Felony.

FICTITIOUS STATEMENTS—Special case - 86
See Special Case.

FOREIGN INSOLVENCY—*Fund in Court—Insolvency in Australia—Petition by Official Assignee at Brisbane—Domicil of Insolvent.*] *W.D.*, who had settled as a grazier in *Australia*, and had, upon his own petition, been adjudicated an insolvent, and received his certificate there, afterwards visited *England* in 1868, and died there intestate, leaving a widow in *Australia*, and creditors who had received only a small dividend on their debts. Under a settlement made on the marriage of the father and mother of *W. D.*, the father, who died in 1869, had power to appoint a fund amongst his children, who, in default of appointment, were entitled equally. The power was not exercised. *W. D.'s* share of the fund had been paid into Court. On a petition by the official assignee in the insolvency, it was *held* that he was entitled to the fund in Court.—*In re Blithman* (Law Rep. 2 Eq. 23) discussed. *In re* Davidson's Settlement Trusts - - - - 383

FOREIGN NOTARY - - - 67
See Notary.

FORFEITURE CLAUSE—*Composition Deed—Recital of Inability to pay Debts.*] By a will certain property was given upon trust for *A.* during his life, or until he should become bankrupt or insolvent, or make a general assignment for the benefit of his creditors, or otherwise deprive himself, or be deprived by law, of the beneficial enjoyment thereof, and after the happening of any such event, over:—*Held*, that the gift over took effect upon *A.* executing a composition deed containing a recital that he was unable to pay his debts in full; and that *A.* could not afterwards dispute the accuracy of the recital. Billson *v.* Crofts [314

FORFEITURE FOR FELONY—*Old Law—Personal Estate—Vested but defeasible Reversionary Interest—Minority of Felon—Conviction for Felony in a Colony—Royal Prerogative.*] A stock legacy, and a share of residuary personalty expectant on the death of a tenant for life, bequeathed to a minor, payable at twenty-one, with a limitation over in the event of his death under twenty-one:—*Held*, to be interests which, prior to the 4th of July, 1870, were forfeitable to the Crown on the conviction of the minor for felony.—On petition by the Attorney-General for payment to the Crown of personal property of a felon:—*Held*, that a conviction in *New South Wales* was sufficient to support the petition. *In re* Bateman's Trust - - - - - - 355

FRAUDULENT PREFERENCE — *Plea — Averments.*] A plea that the Plaintiff's claim is founded on a contract giving the Plaintiff a fraudulent preference over other creditors of a debtor in liquidation, must aver that proceedings in the liquidation had commenced or were imminent when the contract was entered into. McKewan *v.* Sanderson - - - - - 229

FUND IN COURT—Insolvency in *Australia* 383
See Foreign Insolvency.

—— Sequestration—Dividend - - 266
See Sequestration. 1.

—— Transfer to Court of Chancery in *Ireland* - - - - - 173
See Transfer of Fund in Court.

GAS COMPANY—Limit of powers—Injury to individuals - - - - 167
See Limit of Powers of Corporation.

GENERAL LINE OF BUILDINGS — *Church — Owner — Local Improvement Act — Setting back Houses—Delay in exercising Powers* (21 & 22 *Vict. c.* 98, *s.* 35).] The Corporation of *Folkestone* had power, under the *Folkestone Improvement Act*, 1855, to prescribe the line in which any house to be thereafter built or taken down for the purpose of being rebuilt or altered should be erected, on payment of compensation to the owner of any house required to be set back, and it was also provided that no new street to be thereafter laid out should be of less width than forty feet, inclusive of footways, and in the case of existing streets, houses to be thereafter erected were to be set back so as to allow of a width of forty feet:—*Held*, that a church was a house, and a perpetual curate in whom the freehold of the site was vested under 43 Geo. 3, c. 108, an owner within the meaning of the Act.—A temporary church fronting to a road within the borough less than forty feet wide having been pulled down with a view to erecting a permanent church, the Corporation gave notice to the clergyman in charge at the time, of a resolution passed by them that the road on which the church abutted must be not less than forty feet wide; but there was no statement that the additional width was to be gained on the side on which the church abutted, and it appeared that the street might have been widened on the side opposite without removing any buildings.—Afterwards, but not till the foundations of the new church had been put in, the Corporation prescribed a line of building which came within the limits of the church as designed:—*Held*, that they were too late, and could not restrain the erection of the church in the manner in which it had been commenced. Corporation of Folkestone *v.* Woodward - - - 159

GENERAL ORDER, FEB. 1861, rule 22 - 213
See Notice of Examination. 2.

GENERAL RULES IN BANKRUPTCY, 1870, rules 26, 36 - - - 221
See Bankruptcy Jurisdiction.

—— Rule 145 - - - - - 291
See Bankruptcy Appeal.

—— Rule 260 - - - - - 75
See Injunction in Bankruptcy.

GIFT BY IMPLICATION—*Will—Absolute Gift—Life Estate not implied.*] Gift by a testator of all the residue of his estate and effects, real and personal, whatsoever and wheresoever, to his wife, *E. C.*, and after her death, to be equally divided to the children, should there be any; he also appointed his wife sole executrix. There were no children:—*Held*, that the wife was absolutely entitled. Crozier *v.* Crozier - - - 282

GUARANTEE — Continuing, determinable on notice—Death of guarantor - 311
See Continuing Guarantee.

GUARDIAN — Settled Estates Act — Person of unsound mind - - - 284
See Settled Estates Act. 2.

HEIR—Specific devisee—Real estate descended—Devise for payment of debts - 175
See Marshalling.

"HEIRS" — *Will — Construction — Direction to divide a Sum of Money after a Life Estate "amongst the Heirs of my late Brother J. S."—Next of Kin Entitled.*] Testatrix, after devising real estate to a devisee, "and to her heirs and assigns," bequeathed to her trustees £500 upon trust to invest and pay the proceeds to *E. R.* for life, and in case (which happened) *E. R.* should leave no child living at her (*E. R.'s*) decease, "then I direct my said trustees to divide the said sum of £500 . . . amongst the heirs of my late brother" *J. S.*:—*Held*, that by the word "heirs" were meant the next of kin of *J. S.*, according to the *Statute of Distributions*, together with the widow of *J. S.*, if living at testatrix's death. — *Ware* v. *Rowland* (15 Sim. 587) observed upon. *In re* Steevens' Trusts [110

HUSBAND AND WIFE—Settled Estates Act—Marriage of female Petitioner - 66
See Settled Estates Act. 1.

—— Marriage contract - - - 121
See Marriage Contract.

HYPOTHECATION—Letter of - - 69
See Registration of Bill of Sale.

IDENTITY OF PARCELS—*Discovery—Lessor and Lessee—Multifariousness.*] Bill by a reversioner against overholding tenants under expired underleases, alleging that the Defendants were wrongfully in possession of certain parcels comprised in the original lease, and had in their possession divers documents which would shew that the said parcels were comprised in the said lease and the underleases, but refused to produce them, and were colluding together to defeat the Plaintiff. The Defendants demurred generally and for multifariousness, but the Court overruled the demurrers.—Identity is as much matter of title as devolution. Brown *v.* Wales - - 142

IMPLICATION—Life estate—Absolute gift 282
See Gift by Implication.

INDEFEASIBLE TITLE—Mortgage - 156
See Land Transfer Act.

INDEMNITY — Shares in company — Trustee's name on register - - - 363
See Infant Transferee.

INFANT—Devisee—Constructive trust - 78
See Trustee Act.

—— Forfeiture for felony—Defeasible interest
See Forfeiture for Felony. [355

—— Mortgage by - - - - 260
See Mortgage by Infant.

—— Transfer of shares - - - 363
See Infant Transferee.

INFANT TRANSFEREE — *Company — Sale of Shares—Vendor's Name on Register—Vendor a Trustee for Purchaser—Release and Indemnity.*] Plaintiff, a registered owner of fifteen shares in a limited company, sold them through his broker on the *London Stock Exchange*, and 130 shares in the same company, which included the above fifteen, were bought by a broker on the *Exchange*, as agent for a firm of brokers in *Scotland*. The purchase-money was paid, and the name of *W. K.*, of *Aberdeen*, described as an "Esq.," was furnished as that of the purchaser. A transfer deed of fifteen shares from the Plaintiff to *W. K.* was executed by both parties, and registered, *W. K.'s* name remaining on the register till the winding-up, when it was found that he was a clerk in the employ of the Scotch firm of brokers, and an infant. The name of the Plaintiff having been restored to the register, and settled on the list of contributories, as the owner of fifteen shares, and calls having been made, he filed a bill against the Scotch brokers, who, by their answer, disclosed the names of four persons, their principals, *D.*, *E.*, *J.*, and *S.*, as the purchasers of thirty, forty, thirty, and thirty shares respectively in the company, which, however (except as to *E.'s* forty, which did not include the Plaintiff's fifteen), had not been appropriated.—Upon bill by amendment against the brokers and *D.*, *J.*, and *S.*, praying for a declaration that the fifteen shares were held by the Plaintiff as a trustee for *D.*, *J.*, and *S.*, and for release and indemnity:—*Held*, that the Plaintiff was a trustee of the fifteen shares for the Defendants *D.*, *J.*, and *S.*, and release and indemnity of the Plaintiff by the Defendants ordered as prayed. Brown *v.* Black - - - 363

INJUNCTION—Bankruptcy—Foreign creditors 75
See Injunction in Bankruptcy.

—— Patent suit - - - - 115
See Patent Suit.

—— Private injury—Powers of corporation 167
See Limit of Powers of Corporation.

INJUNCTION IN BANKRUPTCY — *Bankruptcy Act*, 1869, *s.* 72—*Bankruptcy Rules*, 1870, *r.* 260—*Foreign Creditors—Actions in Foreign Courts—Jurisdiction—Injunction—Appointment of Receiver—Leave to appear and defend Actions.*] *A.*, a trader in *London*, being in difficulties, sent round a letter to his creditors, asking for indulgence; thereupon certain creditors in *New York* commenced actions in the *New York* Courts in respect of bills accepted, made payable, and dishonoured in *London* to attach the debts due to *A.* from various *New York* firms. *A.* immediately filed a petition for liquidation, a receiver was appointed, and application made for an injunction to restrain the actions in the *New York* Courts:—

INJUNCTION IN BANKRUPTCY—*continued.*

Held, that the Court would not grant an injunction against the foreign creditors suing abroad. *In re* Chapman - - - - - 75

INJURY—Private, by corporation - - 167
See Limit of Powers of Corporation.

INROLMENT — Vacating — Relinquishment by clergyman of his office - - 154
See Clerical Disabilities Act.

INSURANCE—Policy of—Mortgage - 26
See Mortgage of Policy.

INTENTION — Change of — Relinquishment by clergyman of his office - - 154
See Clerical Disabilities Act.

—— To settle - - - - 121
See Marriage Contract.

INTEREST—Demand in writing—Summons 394
See Amalgamation of Companies. 2.

—— Money paid by surety - - - 43
See Interest on Payment by Surety.

INTEREST ON PAYMENT BY SURETY—*Unlimited Company — Winding-up — Creditor.*] A trustee for a company, who pays money on behalf of the company under a contract by which he was legally bound to make such payment, is in no worse position than a stranger who makes advances; and is entitled, in the winding-up of the company, to interest at £5 per cent. on his debt. *In re* Beulah Park Estate. Sargood's Claim [43

INTERROGATORIES BY DEFENDANT—*Exceptions to Answer — Discovery of Plaintiff's Evidence.*] A Defendant who files interrogatories for the examination of a Plaintiff is entitled to an answer with respect to all matters which tend to destroy the Plaintiff's case, but not with respect to matters which tend to support the Plaintiff's case.—Where, therefore, a bill was filed to establish a right of common, and a Defendant filed interrogatories requiring the Plaintiff to set forth any instance in which the right claimed by the bill had been enjoyed:—*Held*, that the Plaintiff was not bound to answer.—*Semble*, that the Plaintiff would have been bound to answer interrogatories with respect to instances in which the right had been claimed and successfully resisted. Commissioners of Sewers of the City of London *v.* Glasse - - - - - 302

INVESTMENTS—Petition for advice of Court 68
See Petition for Advice of Court.

IRISH COURT OF CHANCERY—Transfer of fund in Court - - - - 173
See Transfer of Fund in Court.

JOINT TENANCY—Gift to "my relatives" 148
See "Relations." 1.

—— Protectors of settlement—Survivorship 178
See Protector of Settlement.

JUDGE—County Court—Signature to case for appeal - - - - 83
See County Court Appeal.

JUDGMENT—Sequestration—27 & 58 Vict. c. 112
See Sequestration. [398

JUDGMENT CREDITOR—*Administration of Assets —Action against Legal Personal Representative— 32 & 33 Vict. c. 46—Specialty and Simple Contract Debts—Priority.*] By the statute 32 & 33 Vict. c. 46, the distinction between specialty and simple contract debts in the administration of assets of deceased persons is abolished, but a creditor who first takes legal proceedings against the legal personal representative, and obtains judgment, is, though it be not registered, entitled to be paid his debt in full in priority over all other creditors.—*Jennings* v. *Rigby* (33 Beav. 198) followed. *In re* Williams' Estate. Williams *v.* Williams - - - - - - 270

JURISDICTION — Bankruptcy — Proceedings in wrong Court - - - 221
See Bankruptcy Jurisdiction.

—— Building society—Reference to arbitration [333, 344, n.
See Building Society. 1, 2.

—— Petition for advice of Court - - 68
See Petition for Advice of Court.

—— Special Case Act—Fictitious statements 86
See Special Case.

LAND—Conversion into personalty—Employment in trade - - - - 402
See Conversion.

LAND TRANSFER ACT—25 & 26 *Vict. c.* 53, *s.* 34 *—Registration subject to Mortgage—Sale by Mortgagee — Removal from Register.*] Where the owner of an equity of redemption of real estate is entered on the register of estates with an indefeasible title, subject to a mortgage, and the mortgagee afterwards exercises his power of sale, and conveys part of the registered property to a purchaser, such purchaser is entitled, after his conveyance has been entered on the register, to have the property bought by him, and all entries relating thereto removed from the register without the consent of the mortgagor. *In re* Winter 156

LANDLORD AND TENANT—Discovery of parcels
See Identity of Parcels. [142

LAPSE—Gift over if legatee should die before attaining vested interest - - 386
See Death before Testator.

LETTER OF ALLOTMENT — Sent but not received - - - - 18
See Acceptance of Shares. 1.

LIABILITY—Executor carrying on trade - 134
See Executor carrying on Trade.

LIEN—Solicitor—Costs—*London* agent - 298
See Country Solicitor.

LIFE INSURANCE—Policy of mortgage - 26
See Mortgage of Policy.

LIMIT OF POWERS OF CORPORATION—*Gas Company — Municipal Corporation — Injury to Private Individual—Right to maintain a Suit.*] A municipal corporation having, under the provisions of an Act of Parliament, bought up a gas company which previously supplied gas to the borough, and which had compulsory powers for the purpose within the borough, commenced supplying gas to an adjoining township, in which another gas company already existed having similar powers, within the township. The gas company of the township having filed a bill against the corporation to restrain them from supplying gas within the township, and alleging, as a personal injury which entitled them to maintain their suit, that the corporation had contracted to supply gas to a particular manufactory within the township which otherwise they must have supplied, and that they had thereby been deprived of the profits arising from the supply of gas to the manufactory, and that great loss would be sustained by them:—*Held*, on demurrer, that the injury alleged was not such as entitled the Plaintiffs to maintain the suit. Pudsey Coal Gas Company *v.* Corporation of Bradford - 167

LIMIT OF POWERS OF CORPORATION—*contd.*

LIQUIDATION BY ARRANGEMENT—Injunction —Foreign creditor - - - 75
See Injunction in Bankruptcy.

—— Proceedings in wrong Court - - 221
See Bankruptcy Jurisdiction.

LONDON AGENT—Solicitor—Costs - 298
See Country Solicitor.

LUNACY—Person of unsound mind not so found —Consent to sale - - - 284
See Settled Estates Act. 2.

MARRIAGE CONTRACT—*Marriage—Statements in Writing by Wife's Father of Intention to settle —Agreement made upon consideration of Marriage.*] After proposals of marriage had been accepted, the lady's father wrote to the intended husband as follows:—"*V.* being my only child, of course she will come into the possession of what belongs to me at my decease." In a subsequent letter, addressed to the mother of the intended husband, the father, after declining then to extract £4000 from his business, and stating that some years since he had made a will leaving "all my property" in trust for his daughter for life for her separate use, and the principal to be divided as she by her will might ultimately dispose of, he said, "It has been my intention, in the event of the marriage taking place, to make a similar will in accordance with the facts of the case, and of course I should settle my property (subject to my sister's annuity) on my daughter absolutely and independent of her husband; or, in other words, in strict settlement." He further "agreed" to allow his daughter and her husband £100 a year during his life; and added, "I will take care that my property (which, I suspect, will exceed £4000) shall be properly secured upon her and her children after my death." The marriage having taken place, the father, who was then a widower, afterwards married again, and made a will whereby he devised and bequeathed parts of his property to his wife, and gave several life annuities.—Upon bill by the daughter, claiming to have all the property of which the testator died seised or possessed settled upon her in strict settlement:—*Held*, that the above expressions of intention on the part of the testator amounted to a contract to settle the whole of the property of which he should die seised or possessed upon the Plaintiff in strict settlement. Coverdale *v.* Eastwood - - - - - - - 121

MARSHALLING—*Payment of Testator's Debts—Specifically Devised and Descended Estates.*] A testator gave all and every part of his real and personal property to his executors and trustees, to be disposed of by them according to the directions contained in his will. He directed his executors and trustees, as soon as possible after his death, to pay all his debts, funeral and testamentary expenses; he then gave all his personal estate to his brother absolutely, and he devised specifically various freehold estates, leaving other freehold estates undisposed of, which descended to his heir. The personal estate was insufficient for payment of his debts;—*Held*, that the specifically devised estates and the descended estates were liable rateably to the payment of debts. Stead *v.* Hardaker - - - - - - 175

MEASURE OF DAMAGES—Wrongful working of coal mine - - - - 46
See Adjoining Coal Mines.

MEMORANDUM OF ASSOCIATION—Subscriber of
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MINE—Wrongful working—Mode of taking account - - - - 46
See Adjoining Coal Mines.

MISTAKE—Deed—Rectification—Practice 247
See Mistake in Deed.

—— Sale by Court—Opening biddings 279
See Valuation of Timber.

—— Will—Names left blank - - 289
See Blanks in Will.

MISTAKE IN DEED—*Rectification—Practice.*] A deed was executed purporting (by mistake) to convey a moiety only of real estate, the intention of the parties having been to pass the whole. Infants were interested. Upon bill for rectification:—*Held*, that a conveyance of the other moiety by another deed was not necessary, and order made declaring that the deed was, in the particulars after specified, executed by mistake, that it was intended to pass the entirety, and that the deed ought to be rectified, ordering rectification by words and figures accordingly, and directing a copy of the order to be indorsed on the deed. White *v.* White - - - - 247

MORTGAGE—Costs in administration suit—Executors of mortgagor - - 16
See Costs in Administration Suit. 1.

—— Indefeasible title — Purchase from mortgagee - - - - 156
See Land Transfer Act.

—— Infant—Priority - - - 260
See Mortgage by Infant.

—— Policy of insurance—Priority - - 26
See Mortgage of Policy.

MORTGAGE BY INFANT—*Voidable Transaction—Priority.*] An infant charged his reversionary interest in a fund with payment of a sum lent to him upon his promissory note, and executed a statutory declaration stating (untruly) that he was then of full age. After attaining twenty-one he mortgaged his interest in the fund for an amount exceeding what was ultimately available without disclosing the fact of the prior charge:—*Held*, that the charge given by the infant during his infancy and incapacity to contract was avoided by the subsequent mortgage executed by him when of full age and capable of contracting, to a mortgagee without notice. Inman *v.* Inman - 260

MORTGAGE BY INFANT—*continued.*

MORTGAGE OF POLICY—*Bankruptcy of Assured—Priority by Notice—Death of Assured.*] A policy effected by *A.* on his life was mortgaged in 1860 without notice to the office. *A.* became bankrupt in 1862, and in 1868 joined in a transfer of the mortgage to *B.*, who had no notice of the bankruptcy. After the death of *A.*, *B.'s* solicitor gave notice to the office that this and other policies were mortgaged, and that he acted for the mortgagees, not naming them. Subsequently notice of the bankruptcy was given to the office:—*Held*, that this was sufficient to give priority to *B.* over the creditors in the bankruptcy of the assured. *Stuart* v. *Cockerell* (Law Rep. 8 Eq. 607) followed. —*In re Webb's Policy* (15 W. R. 529) not followed. *In re* Russell's Policy Trusts - - 26

MULTIFARIOUSNESS—Bill of discovery - 142
See Identity of Parcels.

MUNICIPAL CORPORATION—Injury to individual - - - - 167
See Limit of Powers of Corporation.

MUTUAL DEALINGS - - 30, 93
See Mutual Credit. 1, 2.

MUTUAL CREDIT—*County Court Appeal—Set-off—Unliquidated Damages—Mutual Dealings—Bankruptcy Act*, 1869, *s.* 39.] Under the *Bankruptcy Act*, 1869, the right of set-off is extended to unliquidated damages.—Where a person from whom rent is due to an estate in course of administration under the *Bankruptcy Act*, 1869, has a claim against the estate, he may set off his claim against all rent due down to the close of the bankruptcy. Booth *v.* Hutchinson - 30

2. —— *Set-off—Bankruptcy Act*, 1849, *s.* 171—*Credit given to Firm—Bankruptcy of Partner—Party claiming Set-off Trustee only.*] The Plaintiff Bank sold acceptances of theirs to *C. & Co.*, partly in consideration of acceptances of *C. & Co.* The firm of *C. & Co.* consisted of two partners, both of whom in 1866 executed assignments for the benefit of their separate creditors, one of which assignments was registered under the *Bankruptcy Act* of 1861, but the other was not; and the partnership affairs were afterwards wound up in a Chancery suit. At the time when these assignments were executed the acceptances of *C. & Co.* were not due and were in the hands of third parties, who afterwards re-assigned them to the Plaintiff Bank, in order that the Plaintiff Bank might establish a set-off against *C. & Co.*; and it was agreed that any moneys recovered by means of the set-off should be divided between the Plaintiff Bank and the holders of the acceptances in certain proportions:—*Held*, that as there was no bankruptcy of the firm of *C. & Co.*, the Plaintiff Bank were not entitled to set off the acceptances of *C. & Co.* against the acceptances of the Plaintiff Bank:—*Semble*, that the Plaintiff Bank were only in the position of trustees of the acceptances of *C. & Co.*, and on that ground also were debarred from claiming a set-off. London, Bombay and Mediterranean Bank *v.* Narraway - - 93

NAME OF PROPRIETOR OF COPYRIGHT 104
See COPYRIGHT.

NE EXEAT REGNO—*Practice.*] Upon evidence that a Defendant, who has been ordered by decree in an administration suit to pay into Court on or before a certain day the balance admitted by his answer to be due from him to the estate, is about to leave the country, a writ of *ne exeat* may be obtained against him by his co-Defendants, the executors, although the day to which the time for payment was extended has not arrived. SOBEY *v.* SOBEY - - - - - - 200

"NEPHEWS AND NIECES"—*Nephews and Nieces of Testator's Wife.*] Residuary gift in trust for "my nephews and nieces living and the issue of any my nephews and nieces dead before me." Testator left brothers and sisters, but never had any nephews or nieces of his own:—*Held*, that his wife's nephews and nieces were entitled to the gift. SHERRATT *v.* MOUNTFORD - - 305

NEXT OF KIN—Gift of personalty to heirs 110
See "HEIRS."

NOTARY—*Practice—Affidavit—Foreign Notary—15 & 16 Vict. c. 86, s. 22—Consent of Solicitor for Defendant.*] Affidavits made on behalf of the Plaintiff, sworn abroad, before a notary at a place a considerable distance from the residence of any of Her Majesty's consuls, were, on the written consent of the solicitor for the Defendant, allowed to be filed. LYLE *v.* ELLWOOD - - 67

NOTICE—Allotment of shares - - 18
See ACCEPTANCE OF SHARES. 1.

—— Cross-examination of Defendant - 102
See NOTICE OF EXAMINATION. 1.

—— Determination of guarantee - - 311
See CONTINUING GUARANTEE.

—— Examination taken abroad - - 213
See NOTICE OF EXAMINATION. 2.

—— Mortgage of policy of insurance—Bankruptcy of assured - - - - 26
See MORTGAGE OF POLICY.

NOTICE OF EXAMINATION—*Practice—Cross-examination—Items of Account—Insufficiency of Notice.*] Where an accounting party is served with notice of cross-examination on his accounts, it is not sufficient to inform him that all the items except one are objected to, but the notice must specify the points on which the cross-examination is to proceed. MCARTHUR *v.* DUDGEON. [102

2. —— *Practice—Evidence—Order of the 5th of February, 1861, Rule 22—Foreign Examination.*] The order of 5th of February, 1861, Rule 22, requiring the party summoning a witness to give to the opposite party "forty-eight hours' notice at least of his intention to examine or cross-examine such witness," will not be applied strictly in the case of an examination taken abroad before examiners specially appointed.—*Semble*, an objection to a deposition on the ground of irregularity should be taken at the hearing when the deposition is tendered in evidence, and not by motion to take it off the file. DE BRITO *v.* HILLEL 213

OFFICIAL ASSIGNEE—Foreign insolvency 383
See FOREIGN INSOLVENCY.

OPENING BIDDINGS—Sale by Court—Valuation of timber - - - - 279
See VALUATION OF TIMBER.

ORDER AND DISPOSITION—*Bankruptcy—Reputed Ownership—Bill of Sale executed before, but registered after, the filing of a Petition for Liquidation—Possession of Grantor to continue till Default in Payment on Demand—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 15, sub-s. 5.*] A bill of sale was executed on the 9th of January, 1872. On the 23rd of January the grantor filed a petition for liquidation. On the 30th of January the bill of sale was registered, and on the 12th of February the trustee under the liquidation took possession of the property. The bill of sale provided that the grantor should continue in possession of the property until default in payment upon demand of what should be due to the grantee. The grantor remained in possession of the property until the 12th of February, no demand for payment or possession having been made by the grantee. On that day the grantee authorized an agent to take possession, but no possession was taken by him:—*Held* (reversing a decision of the County Court Judge at *Manchester*), that the trustee was entitled to the property as against the bill of sale holder. Goods comprised in a bill of sale, which entitles the holder to take possession upon default in payment after demand, remain, notwithstanding the registration of the bill of sale, until demand is made, in the reputed ownership of the grantor. Observations upon *Ashton* v. *Blackshaw* (Law Rep. 9 Eq. 510), and *Ex parte Homan* (Law Rep. 12 Eq. 598). *Ex parte* HARDING. *In re* FAIRBROTHER - - - - - 223

PAID-UP SHARES—Subscriber of memorandum
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PARENT AND CHILD—Advancement—Reservation of interest by father - - 55
See ADVANCEMENT.

PAROL TRUST—Promise to testator on his deathbed - - - - - 318
See SECRET TRUST.

PARTIES—Cross-examination of—Notice 102
See NOTICE OF EXAMINATION.

PARTITION SUIT—*Declaration of Rights of Parties—Sale—Further Consideration Reserved—Costs.*] Where infant Plaintiffs prayed for a declaration that premises were divisible amongst them and a Defendant, and that the costs of the suit might be taxed, and the Plaintiffs' costs declared to be a charge on their shares; for a partition, or sale, and, after payment of the costs, for a division of the proceeds, the Court made a declaration as to the rights of the parties, and directed a sale, but declined to make any order as to the costs until the further consideration of the cause. Form of decree in *Young* v. *Young* (Law Rep. 13 Eq. 175, n.) and *France* v. *France* (Law Rep. 13 Eq. 173) not followed. DAVEY *v.* WIETLISBACH - - - - - 269

PARTNERSHIP—Bankruptcy of partner—Set-off - - - - - 93
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PARTNERSHIP—*continued.*

—— Conversion—Land involved in trade 402
See Conversion.

——Copyright—Name of firm - - 104
See Copyright.

PATENT SUIT—*Injunction—Discovery—Names and Addresses of Purchasers—Names and Addresses of Agents.*] A patentee of improvements in brick-cutting machines, who was a manufacturer of the machines by an agent at the agent's works and not a licenser, having obtained a perpetual injunction against Defendants, who were also manufacturers of brick-cutting machines, from infringement, the Defendants were ordered to file an affidavit stating the number of machines made by them since the date of the patent, and the names and addresses of the persons to whom the same had been sold, and of the agents concerned in the transactions. Upon motion to vary the order:—*Held*, that the Plaintiff was entitled to have discovery of the names and addresses of the purchasers, but not of the agents concerned, there being nothing to shew that any agents had been employed. Murray *v.* Clayton - 115

PAYMENT—By way of penalty - - 36
Relief against Penalty.

—— Into Court—Absconding Defendant - 200
See Ne exeat Regno.

—— Into Court—Court of Chancery Funds Act—Securities - - - - 316
See Chancery Funds Act.

—— Into Court—Trustee Relief Act—Costs 194
See Trustees Relief Act.

—— Out of Court—Deposit by railway company - - - - - 108
See Deposit by Railway Company.

—— To one trustee - - - - 204
See Payment to one Trustee.

PAYMENT TO ONE TRUSTEE—*Breach of Trust—Solicitor dealing with Trust Estate—Discharge.*] A firm of solicitors having been employed by the trustees of a will to receive the proceeds of the testator's real estate, which had been taken by a railway company, paid over the money to one of such trustees without the receipt or authority of the other. The money having been lost to the estate by the insolvency and death of the trustee to whom it was paid:—*Held*, that the receipt of one trustee only (though also an executor) was not a sufficient discharge to the solicitors for the money which they had received by the authority of the two, and that they were personally liable to make good the loss which had resulted to the trust estate from such improper payment. Lee *v.* Sankey - - - - 204

PENALTY—Relief against - - - 36
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PETITION—Advice of Court—22 & 23 Vict. c. 35—English and Irish trustees - 68
See Petition for Advice of Court.

—— Settled Estates Act - - 66, 284
See Settled Estates Act. 1, 2.

PETITION FOR ADVICE OF COURT—*Practice—22 & 23 Vict. c. 35, s. 30—English and Irish Trustees—Jurisdiction—Service of Petition.*] On a Petition (not served on any person) by English and Irish trustees under the 22 & 23 Vict. c. 35, s. 30 (the domicil of the testator and the tenant for life being Irish and English respectively) for the opinion of the Court as to the power of the trustees to make certain investments, the Court, there having been no application to the Court of Chancery in *Ireland*, exercised jurisdiction, and did not require the Petition to be served on any one. *In re* French's Trusts - - 68

PLEADING—Multifariousness—Discovery of parcels - - - - - 142
See Identity of Parcels.

—— Plea of fraudulent preference - - 229
See Fraudulent Preference.

—— Plea that Defendant is not executor - 79
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PLEDGE—Factor—Letter of hypothecation 69
See Registration of Bill of Sale.

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PRACTICE—Absconding Defendant - 219, 257
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—— Attorney-General—Costs, charges, and expenses - - - - - 294
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—— Interrogatories by Defendant - - 302
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—— Partition suit—Costs - - - 269
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—— Payment out of Court—Deposit by railway company - - - - 108
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—— Privileged communication - - 257
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—— *Pro confesso* - - - - 259
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—— Rectification of deed—Form of order 247
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—— Sale by Court—Auction—Private tender *See* Sale in Chambers. [150
—— Sequestration - - - 266, 398 *See* Sequestration. 1, 2.
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—— Special case—Fictitious statements - 86 *See* Special Case.
—— Transfer of fund in Court to Court of Chancery in *Ireland* - - 173 *See* Transfer of Fund in Court.
—— Trustee Act, 1850 - - - 78 *See* Trustee Act.

PREFERENTIAL DEBTS—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 32—*Payment in full—Wages and Salaries—Composition.*] A schoolmaster filed a petition for liquidation, and his creditors resolved to accept a composition. Among the creditors were a music master and a drill sergeant, who were engaged by the term to attend the school twice a week, at a fixed payment per hour or per lesson, to give lessons to the pupils:—*Held*, that the sums due to these creditors were not preferential debts within sect. 32, sub-sect. 2, of the *Bankruptcy Act*, 1869:—*Held*, also, that sect. 32 has no application to the case of a composition. *Ex parte* Walter. *In re* Heath 412

PRESUMPTION—Advancement by father - 55 *See* Advancement.

PRIORITY—Judgment against executor - 270 *See* Judgment Creditor.
—— Mortgages by infant and by same person when adult - - - - 260 *See* Mortgage by Infant.
—— Mortgage of policy of insurance—Bankruptcy—Notice - - - 26 *See* Mortgage of Policy.

PRIVILEGED COMMUNICATION—*Practice—Absconding Defendant—Solicitor and Client—Client's Address.*] The Court will not make an order upon a solicitor compelling him to disclose the address of his client (a Defendant) who has absconded, and whom Plaintiff seeks to serve with a *subpœnâ duces tecum* to compel his appearance at the hearing with documents material to the Plaintiff's case. Heath *v.* Crealock - - - - 257

PRO CONFESSO—*Practice—Service.*] Upon evidence that an absconding Defendant, against whom an order had been made for taking the bill *pro confesso*, had not been heard of, that his address was unknown, and that he was believed to be still out of the jurisdiction, the Court dispensed with service upon him of the decree made on the 11th of November, 1872, upon the bill as taken *pro confesso*. Manser *v.* Manser - 259

PROTECTOR OF SETTLEMENT—*Fines and Recoveries Act* (3 & 4 *Will.* 4, *c.* 74), *s.* 32—*The office survives.*] A testator devised all his real estate to the use of his son *George* for life, with remainder to his first and other sons successively, in tail male, and the testator appointed two persons, not including the tenant for life, to be protectors of the settlement under the 32nd section of the *Fines and Recoveries Act*. There was no provision for filling up a vacancy in the office of protector. The tenant for life conveyed his life estate to his son, the Plaintiff, who was the first tenant in tail. One of the protectors died, and the survivor joined with the tenant in tail in a disentailing deed; the estate was then sold to a purchaser for an estate in fee simple:—*Held*, that the estate was effectually barred by the surviving protector having joined in the disentailing deed, and a demurrer to a bill for specific performance of the contract for sale was overruled: *Held*, also, that where a doubt arises upon the validity of a title, the decision of the Court removes the doubt, and specific performance will be enforced.—Bell *v.* Holtby - 178

PURCHASER—Patent article—Discovery of name and address - - - - 115 *See* Patent Suit.

RAILWAY COMPANY—Compulsory powers—Infant devisee - - - 78 *See* Trustee Act.
—— Deposit by - - - - 108 *See* Deposit by Railway Company.

RECEIPT—One of several trustees - - 204 *See* Payment to one Trustee.

RECITAL—Composition deed—Forfeiture clause *See* Forfeiture Clause. [314

RECTIFICATION—Deed—Form of order - 247 *See* Mistake in Deed.
—— Register - - - - - 274 *See* Winding-up Petition.

REGISTER—Rectification of - - 274 *See* Winding-up Petition.

REGISTRATION—Bill of sale—Reputed ownership - - - - - 223 *See* Order and Disposition.
—— Bill of sale—Letter of hypothecation 69 *See* Registration of Bill of Sale.
—— Lands Registry Act - - - 156 *See* Land Transfer Act.
—— Order of Court of Chancery—Judgment debt—27 & 28 Vict. c. 112 - - 398 *See* Sequestration. 2.

REGISTRATION OF BILL OF SALE—*Bankruptcy Act*, 1869—*Bills of Sale Act* (17 & 18 *Vict. c.* 36)—*Factors Act* (5 & 6 *Vict. c.* 39)—*Letter of Hypothecation—Equitable Charge—Bill of Sale—Reputed Ownership.*] *A.*, being a factor and warehouse keeper, by letter of hypothecation pledged to *B.* certain wools to secure a sum of money. No delivery of the warrants for the wools was made, but a promise to deliver them on the following morning was added at the foot of the letter. After being pressed daily to deliver the warrants, *A.* absconded. *B.* thereupon obtained from *A.'s* clerk the keys of the warehouses and possession of the wools. *A.* was a few days afterwards adjudicated bankrupt. The wools belonged to third parties, who had, however, been under advances from the bankrupt, and made no claim:—*Held*, that the letter created a good equitable charge; that it did not require registration under the *Bills of Sale Act*; that the goods were not in the order and disposition of the bankrupt; that the transac-

REGISTRATION OF BILL OF SALE—*continued.*
tion was a valid pledge under the *Factors Act*; and that *B.* had a good title against the trustee in bankruptcy. *Ex parte* North Western Bank. *In re* Slee - - - - - - 69

"RELATIONS"—*Will—Construction—Time when Class to be ascertained—Joint Tenancy.*] Testatrix directed all her property at the death of *A.* and *B.* "to pass to my relatives in *America*":—*Held*, that the class was to be ascertained at the death of the testatrix; and that all her next of kin in *America* then living were entitled as joint tenants. Eagles *v.* Le Breton - - 148

2. —— *Will—Construction.*] Testator, after giving legacies to various persons, describing their relationship, including a person described as his niece, but in reality illegitimate, and persons connected by affinity, directed that if the whole of his property made more than the whole amounts mentioned in his will, it should be divided "amongst my relations in proportion to their separate amounts":—*Held*, that only such of the legatees as were blood relations were entitled under the residuary gift. Hibbert *v.* Hibbert - 372

RELIEF AGAINST PENALTY—*Claim under an Award—Payment ordered to be made as a Penalty—Whether recoverable in full, or to the extent only of such Damages as the Court might assess.*] An action at law was by consent of the parties referred, and the arbitrator awarded and ordered that the Defendant in the action should pay to the Plaintiff in the action an annuity of £1200 a year for life, and that, "in order to secure the annuity," the Defendant should, within two months, purchase and convey to trustees, on behalf of the Plaintiff, a government annuity of £1200 a year, and that if for any reason the annuity should not have been legally secured before the last day of the second month from the date of the award, then, in addition to the annuity, a further sum of £100 should become due and payable by the Defendant to the Plaintiff on the last day of the second month, and a like sum of £100 on the last day of each successive month, until such annuity should be legally secured; and the award added: "These monthly payments are to be considered as additional to the payments due in respect of the annuity, and as a penalty for delay in the legal settlement of the same."—No annuity, as directed by the award, having ever been purchased; the Plaintiff having been adjudicated a bankrupt; the Defendant having died; and the £1200 a year and £100 a month having been regularly paid to the Plaintiff and her assignees up to the Defendant's death, but not since; upon claim by the assignees to prove against the Defendant's estate for the payments due in respect of the annuity, and of the monthly payments accrued due since his death:—*Held*, that the £100 a month, though called a penalty, was not to be regarded strictly as such; and that the assignees were entitled to prove for the arrears both of the annuity and the £100 a month. Parfitt *v.* Chambre. *Ex parte* D'Alteyrac - - - - - - 36

REMOTENESS—Damage—Loss of trade - 376
See Compensation under Lands Clauses Act.

RENT—Set-off—Bankruptcy - - 30
See Mutual Credit. 1.

REPUDIATION OF SHARES—Conditional application - - - - - 236
See Acceptance of Shares. 2.

REPUTED OWNERSHIP - - - 223
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—— Letter of hypothecation - - 69
See Registration of Bill of Sale.

RESCINDING CONTRACT—Suit for specific performance—Absconding Defendant 219
See Contempt, Process of.

RESIDENCE—Succession duty - - 1
See Succession Duty.

RESTRAINT OF TRADE—*Void if unnecessarily extensive.*] A covenant by a clerk and traveller with a firm of brewers that he would not, during his service or within two years afterwards, either directly or indirectly, sell, procure orders for, or recommend, or be in anywise concerned or engaged in the sale or recommendation, either on his own account or for any other person, public company or corporation, of any *Burton* ale or porter brewed at *Burton*, or offered for sale as such, other than the ale, beer, or porter brewed by the Plaintiffs:—*Held*, void, as unnecessarily extensive. Allsopp *v.* Wheatcroft - - - - - - 59

SALARY—Payment in bankruptcy - 412
See Preferential Debts.

SALE—By Court—Costs of mortgagee - 16
See Costs in Administration Suit. 1.

—— By Court—Partition suit - - 269
See Partition Suit.

—— By Court—Sale by private tender - 150
See Sale in Chambers.

—— By Court—Settled Estates Act - 284
See Settled Estates Act. 2.

—— By Court—Valuation of timber - 279
See Valuation of Timber.

—— Railway Company—Compulsory powers 78
See Trustee Act.

SALE IN CHAMBERS—*Practice—Order directing Sale by Public Auction—Sale by Private Tender.*] Although, in pursuance of an order of Court directing a sale of real estate by public auction, an attempt has been made to sell by public auction and has failed, the property cannot be sold otherwise than by public auction until a proper order for the purpose has been obtained, and any prevailing practice at Chambers to the contrary is irregular. Berry *v.* Gibbons. *Ex parte* Lee 150

SECRET TRUST—*Will—Absolute Bequest—Husband and Wife—Marital Right.*] Testator gave the residue (which amounted in value to about £6500) of his personal estate upon trust to permit a married woman to receive the income during her life, with remainder after her death for the benefit of her children, and if no children, for the husband absolutely. In the event of the death of the wife in the lifetime of her aunt *N.*, testator directed that the then legally secured income of the aunt, if below £250 a year, should be made up to that amount.—From the death of the testator,

SECRET TRUST —*continued.*

in April, 1861, down to February, 1865, an annuity of £300 was regularly paid to *N.*, by arrangement, out of the husband's banking account; but the wife having eloped in September, 1864, the payment was, after the above date, discontinued.—In 1869, the bill was filed by *N.* against the husband and wife, alleging by amendment, after the answer of the wife (who supported the Plaintiff's case) had come in, that the husband and wife both promised the testator, at his request, on his deathbed, to make an allowance of £300 a year to the Plaintiff, and praying for a declaration that the income of the testator's residuary real and personal estate "was and is subject to a trust" for the payment of £300 a year to the Plaintiff during the wife's life, if the Plaintiff should so long live; and for payment of the arrears of the annuity by the husband.—The husband denied having made any such promise; but it having been found as a result of the evidence that a promise, as alleged, was made to the testator by the wife, and was assented to by the husband:—*Held*, that the income of the testator's estate was subject to the alleged trust; and an account and payment ordered accordingly.—No costs allowed to the Plaintiff, who was merely a nominal suitor; the suit being, in substance, that of the wife.—*McCormick* v. *Grogan* (Law Rep. 4 H. L. 82) followed. NORRIS *v.* FRAZER - - - - - 318

SEQUESTRATION—*Practice—Execution of Decrees and Orders—What may be taken—Dividend of Fund in Court.*] A dividend of a fund in Court, the income of which had been ordered to be paid to the separate use of a married woman, who was entitled to the same for life for her separate use without power of anticipation, fell due four days before the issue of a writ of sequestration for costs ordered by the Court for Matrimonial Causes to be paid by the married woman. Notice of the issue of the writ having been given at the Paymaster-General's office, payment of the dividend had been refused. Upon petition:—*Held*, that the sequestrators were entitled to take so much as necessary of the dividend in satisfaction of their demand. CLAYDON *v.* FINCH 266

2. —— *Administration Suit—Defendant ordered to pay Moneys into Court—Registration—Contempt—Sequestration of Real Estate—27 & 28 Vict. c.* 112 *—Petition by Plaintiffs for Sale of Real Estate refused—Costs.*] A Defendant in an administration suit failed to comply with an order (which had been registered) directing him to pay two sums of money into Court to the credit of the cause. Sequestrators, under a writ issued by the Plaintiffs, having entered into possession of the Defendant's real estate, a Petition was presented by the Plaintiffs, under the Act to amend the Law relating to future Judgments, Statutes, and Recognizances (27 & 28 Vict. c. 112), praying that such real estate might be sold and the proceeds applied in payment of the moneys due from the Defendant:—*Held*, that the Plaintiffs were not creditors to whom the real estate of their debtor had been delivered in execution, and Petition dismissed accordingly. JOHNSON *v.* BURGESS - 398

SERVICE—Order to take bill *pro confesso* - 259
See PRO CONFESSO.

SERVICE—*continued.*

—— Petition for advice of Court - - 68
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SET-OFF—Bankruptcy - - - 39, 93
See MUTUAL CREDIT. 1, 2.

SETTLED ESTATES ACT—*Practice—Presentation of Petition—Advertisements—Marriage of Female Petitioner.*] A spinster, with others, presented a Petition under the *Leases and Sales of Settled Estates Act*, 1856. After the publication of advertisements, but before the hearing of the Petition, she married. Fresh advertisements, and the examination of the married woman, were dispensed with. *In re* MARSHALL'S SETTLED ESTATES 66

2. —— *Person of Unsound Mind not so found by Inquisition—Order made, under s.* 36 *of Act, appointing a Guardian—Sale of Estate by the Court—Objection to Title by Purchaser allowed.*] On a petition presented under the *Leases and Sales of Settled Estates Act*, an order was made for the sale of an estate to which *A. B.*, a person of unsound mind, but not so found by inquisition, was entitled for life in remainder. *A. B.'s* brother had been previously appointed, under the 35th section of the Act, the guardian of *A. B.* and of certain infants, for the purpose of consenting on their behalves to the application, and he was to be at liberty on behalf of the infants to consent. The order for the sale was made upon hearing counsel for *A. B.* by his guardian, and the guardian by his counsel consenting. The purchaser objected to the title on the ground that only a committee properly appointed could consent on behalf of *A. B.*:—*Held*, that the objection was well founded; and a summons taken out by the vendors to compel the payment of the balance of the purchase-money, interest, and the costs, dismissed. *In re Venner's Settled Estates Act* (Law Rep. 6 Eq. 249) considered. *In re* CLOUGH'S ESTATE - - - - - - 284

SETTLEMENT—Expression of intention to settle
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—— Succession Duty - - - 1
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SOLICITOR—Breach of trust—Payment to one trustee - - - - 204
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—— Country—London agent—Lien. - 298
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—— Privileged communication - - 257
See PRIVILEGED COMMUNICATION.

SPECIAL CASE—*Practice—Jurisdiction—Fictitious Statements in Case.*] On a special case raising questions of legal limitations at the instance of a Plaintiff not in possession, the Court declined to make any order or to entertain any fictitious question as to title deeds or accounts in order to found jurisdiction. *Key* v. *Key* (4 D. M. & G. 73) observed on. *Forsbrook* v. *Forsbrook* (Law Rep. 3 Ch. 93) distinguished. PRYSE *v.* PRYSE - - - - - - 86

SPECIALTY DEBT—Judgment against executor
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SPECIFIC DEVISE—Devisee and heir-at-law—Devise for payment of costs - 175
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SPECIFIC PERFORMANCE — Absconding Defendant—Rescinding contract - 219
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SUBSCRIBER OF MEMORANDUM—*Company—Article of Association—Allotment of Paid-up Shares—Agreement.*] *W. D.*, one of the seven persons who subscribed the memorandum of association of a company, to work a certain concession, agreed to take 100 shares. A recital of the articles of association was that *E.*, who assigned the concession to the company, had agreed to cause to be allotted to the persons subscribing the articles, shares to be deemed fully paid up, and the 5th article stated that the shares of each subscriber of the memorandum should be allotted to him as fully paid up, and that a competent number of shares should be allotted to *E.* in pursuance of the arrangement which had been previously come to. The company was registered on the 22nd of September, 1865, and on that day the directors issued to *E.*, for work already done, &c., &c., £50,000 in debentures and 4000 shares. *W. D.* was a director.—On the 3rd of October, 1865, *E.* requested the secretary to place shares of the 4000 in the names of the persons mentioned, *W. D.* being one of them, for 100 shares. The company was afterwards ordered to be wound up. The official liquidator placed the name of *W. D.* on the list of contributories in respect of the 100 shares for which he subscribed, and on summons asking that a call of £3 a share might be made:—*Held*, that *W. D.'s* name had been rightly placed on the list, and that he must pay the call, and that it was not competent to persons who had bound themselves by the memorandum to take and pay for shares, to introduce an article into the articles of association to the effect that they should not be called upon to pay anything.—*Pell's Case* (Law Rep. 5 Ch. 11) observed upon. *In re* Anglo-Moravian Hungarian Junction Railway Company. Dent's Case - - - 407

SUCCESSION DUTY—*Foreign Domicil—Settlement—Residuary Estate.*] By a marriage settlement executed in *England* the husband assigned to trustees (all domiciled and resident in *England*) an English policy of assurance, effected on his own life for £2000, payable at the expiration of six months after his death, and a sum of £1047 3*s.* 8*d.* Consols, and covenanted to pay to the trustees within three years a sum of £1000; and it was declared that the policy moneys and the £1000 should be held upon trusts for investment and payment of the income to the wife for life, and then to the husband for life, and then for division among the children of the marriage. The husband died within three years, having been at the time of his marriage, and thenceforth, up to the time of his death, domiciled in *New South*

SUCCESSION DUTY—*continued.*

Wales. The wife survived only three months, and left one child, the Plaintiff, who was also domiciled abroad. At the time of the wife's death neither the policy moneys nor the £1000 covenanted to be paid to the trustees of the settlement had been paid to them:—*Held*, on the authority of *Attorney-General* v. *Campbell* (Law Rep. 5 H. L. 524), that succession duty was payable by the Plaintiff on the funds to which he became entitled under the settlement.—By his will the husband appointed trustees and executors in *New South Wales* to collect his residuary estate (which was all locally situate in that country), and transmit the same to trustees and executors in *England*, who were to invest the funds so transmitted in Government funds or real securities, and pay the income to his wife for her life, and after her death to divide the same among the children. At the time of the wife's death no part of the residuary estate had reached the hands of the English trustees, but large remittances were afterwards made to them:—*Held*, that no succession duty was payable by the Plaintiff on the funds to which he became entitled under the will. Lyall *v.* Lyall - - 1

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TRANSFER OF FUND IN COURT—*Transfer to Court of Chancery in Ireland—Form of Order.*] Where a fund in Court in a cause or matter is required to be transferred to the Court of Chancery in *Ireland*, the proper form of order is to direct that it be transferred to the Accountant-General of the Court of Chancery in *Ireland*, to be by him forthwith transferred into his name as such Accountant-General to the credit of the cause or matter to which it is required to be transferred. Vaughan *v.* Marquis of Headfort. Cockburn *v.* Marquis of Headfort - 173

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—— Shares in company—Vendor trustee for purchaser—Indemnity - - 363
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TRUSTEE ACT (13 & 14 *Vict. c.* 60)—*Railway Company—Compulsory Powers—Agreement to sell—Infant Devisee—Constructive Trustee.*] Where the owner of lands agrees to sell to a railway company land which they have power to take for the purposes of their undertaking, and afterwards dies, having devised his real estate to an infant, the infant devisee is a trustee within the meaning of the *Trustee Act*, 1850, and a vesting order may be made on a Petition under that Act. *In re* Lowry's Will - - - - - 78

TRUSTEES RELIEF ACT (10 & 11 *Vict. c.* 96)—*Payment into Court—Trustees' Costs.*] Trustees will not be allowed the costs occasioned by paying money into Court under the *Trustees' Relief Act*, when they do so for the mere purpose of escaping liability, and when there is no reasonable doubt as to the performance of their trust. *In re* Elliot's Trusts - - - - 194

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VALUATION OF TIMBER—*Vendor and Purchaser—Sale by Court—Mistake—Opening Biddings.*] At a sale of an estate by auction under the direction of the Court, *J. E.* having previously been informed of the value of the timber, purchased lot 2, and agreed to take the timber at the price named by the auctioneer. The Chief Clerk confirmed the sale and filed his certificate. It was subsequently discovered that the value of the timber on a portion of the lot had been, by the mistake of the auctioneer, omitted:—*Held*, on summons by the vendors, that the purchaser was entitled to hold the property without submitting to a valuation of the timber. Griffiths *v.* Jones [279

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WINDING-UP PETITION—*Consent Order—Rectification of Register—Petitions in another branch of the Court—Summons to settle Names removed dismissed.*] In March, 1871, *J. W.*, a creditor and contributory of a limited company, the directors of which had power to accept surrenders of shares, presented a petition for a winding-up order, and on the 29th of May, 1871, on the hearing before *Malins*, V.C., of the petition, an order was made, as on a motion to rectify the register, by consent of the parties, rectifying the register by removing the names of *J. W.* and others. On the same 29th of May other petitions were presented for a winding-up, and on the hearing on the 8th of July, 1871, *Wickens*, V.C., made an order for that purpose. A summons by the liquidator to settle the name of *J. W.* (a representative case) on the list of contributories was, in consequence of the consent order made by *Malins*, V.C., dismissed:—An *ex parte* application on behalf of another contributory for leave to take proceedings to discharge the consent order was refused. *In re* London Suburban Bank - - - 274

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